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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 191

THE UNITED STATES, APPELLANT

vs.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

No. 192

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED, APPELLANTS

vs.

THE UNITED STATES

APPEALS FROM THE COURT OF CLAIMS

FILED JUNE 29, 1940

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INDEX

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IN THE COURT OF CLAIMS

No. 42696

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

v.

THE UNITED STATES

I. *Petition*

Filed July 20, 1934

To the Honorable the Chief Justice and Judges of the Court of Claims:

The plaintiff, Edward F. Goltra, respectfully represents:

FOR A FIRST CAUSE OF ACTION

I. Plaintiff is and was during all of the times of the occurrences hereinafter mentioned a citizen of the United States and a resident of the City of St. Louis, State of Missouri, and his post office address then and now is 4487 Lindell Boulevard, St. Louis, Missouri.

II. This petition is filed pursuant to Private Act No. 69, enacted at the Second Session of the Seventy-third Congress of the United States and approved by the President April 18, 1934, a copy of which is annexed hereto marked "Exhibit A" and made a part hereof.

III. On or about May 28, 1919, plaintiff entered into a contract with the United States, hereinafter referred to as the "original contract" a copy of which is annexed hereto marked "Exhibit B" and made a part hereof.

2 IV. By said original contract the United States agreed to and did lease to plaintiff nineteen (19) barges and three (3) or four (4) towboats for the term of five years beginning with the date of delivery of the first barge or towboat, and plaintiff agreed among other things to operate said barges and towboats as a common carrier upon the Mississippi River and its tributaries for the period of the lease, transporting iron ore, coal, and other commodities, at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War, and it was understood and agreed that the Secretary of War would fix rates substantially lower than the rail tariffs so plaintiff could obtain business and

profitably operate said barges and towboats. Said original contract also provided that plaintiff should pay all operating expenses of said barges and towboats, maintain said barges and towboats in good condition, hold the United States free from liability in connection with said barges and towboats, discharge all liens against any of said barges and towboats, procure certain insurance and furnish certain bonds for the protection of the United States, and keep accurate detailed accounts of the business of said barges and towboats. Said original contract also contained the following provisions:

"3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the Secretary of War as soon as practicable after each proper determination of the amount thereof but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the Secretary of War in a special deposit account and shall continue so to be turned over to him and so deposited by him until such time as
3 said net earnings shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 percent. per annum computed from the respective dates of delivery of the several vessels of the fleet and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall until all vessels of the government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

* * * * *

"5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee and one by the said two members unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the

value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

"(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States, under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the fleet, plus
4 interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

"(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under Section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 percent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

"(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

"6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War shall be as follows:

"There shall be sixteen (16) payments. The first shall coasist of all moneys on deposit to the credit of the Secretary of
5 War, as indicated above, and shall be so applied at the date of the sale. The Lessee shall execute for the balance fifteen (15) promissory notes in equal amounts, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

"8. The lessor reserves the right to inspect the plant, fleet, and work, at any time to see that all the said terms and conditions of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels." The Chief of Engineers of the United States Army was the person designated and referred to in said original contract as the "lessor."

V. On or about May 27, 1921, plaintiff entered into a supplemental contract with the United States, hereinafter referred to as the "supplemental contract," a copy of which is annexed hereto marked "Exhibit C" and made a part hereof.

VI. Said supplemental contract supplemented and modified said original contract so as more fully to provide for the operation by plaintiff of said barges and towboats as a common carrier as aforesaid by providing unloading facilities at St.
6 Louis, Missouri, and providing for the sale of such facilities to plaintiff under certain conditions. By said supplemental contract the United States agreed to erect, on a tract of land and runway to be provided by plaintiff, unloading facilities for the use of said barges and towboats, and plaintiff agreed at his own expense within eight months to provide the necessary land and runway on which said unloading facilities were to be erected and stand. Said supplemental contract also provided that plaintiff should maintain and operate said unloading facilities in connection with said barges and towboats as a common carrier; that plaintiff should procure certain insurance for the benefit of the United States; that the terms of the original contract as to net earnings, appraisement, option to purchase, conditions of purchase and inspection, should govern, as far as applicable to said unloading facilities; and that in case plaintiff should not take over and pay for said unloading facilities the lessor might remove the same or lease the land and runway on which they stand for five years with privilege of renewals, the terms if not mutually agreed upon by the lessor and plaintiff to be fixed by a board of three persons, one member to be selected by the lessor, one by the plaintiff, and one by the two aforesaid members. The Chief of Engineers of the United States Army was the person designated and referred to in said supplemental contract as the "lessor."

VII. In 1920 the United States acting by and through the Secretary of War and subordinate officers and agents of the War

Department, began the transportation of commodities as a common carrier upon the Mississippi River and its tributaries by means of a fleet of barges and towboats owned and operated by it, known as the "Mississippi Warrior Service." Said Mississippi Warrior Service was authorized and permitted by defendant to carry all commodities at rates of 80 percent of the all-rail rates.

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VIII. In March, 1921, in anticipation of the delivery to him of said barges and towboats and in order to be able to solicit business therefor and answer numerous inquiries from river cities and others as to what his rates for transportation would be, plaintiff requested that his rates be fixed at 80 per cent of the all rail rates, which was the basis of the rates then being charged by the United States itself for transportation by said Mississippi Warrior Service, and the Secretary of War of the United States, thereupon fixed plaintiff's rates at 80 per cent of the all rail rates. This difference of rates between the all rail rates and the barge rates at which plaintiff by virtue of his contract should operate was very important to plaintiff in obtaining business as shippers could have their goods transported by railroad much more rapidly than by river transportation and they had long been accustomed to transporting their goods by railroad, and the 20% lower rates would serve as an inducement to persuade them to discontinue their transportation by railroad and change their mode of shipment to river transportation.

IX. In reliance upon the action of the Secretary of War in fixing plaintiff's rates as alleged in Paragraph VIII hereof, plaintiff held himself out to the public as being ready, willing and able to transport commodities at such rates when said barges and tow boats should be delivered to him, and solicited, negotiated for securing from numerous shippers, and obtained several commitments for, transportation at said rates of grains, oil,

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coal, manganese ore and other commodities, and prepared to carry on such transportation when said barges and towboats should be delivered to him, and did numerous other acts preparatory to and in reliance upon the exercise of his right to operate said barges and towboats as a common carrier upon the Mississippi River and its tributaries at such rates.

X. Over a year after the Secretary of War had fixed plaintiff's rates as alleged in Paragraph VIII hereof and with knowledge of the facts alleged in Paragraphs VII, VIII and IX hereof, the Secretary of War of the United States notified plaintiff that plaintiff would not be permitted to operate said barges and towboats on the Mississippi River and its tributaries below St. Louis in competition with said Mississippi Warrior Service, that plaintiff's right to operate said barges and towboats at 80%

of the all rail rates on the Mississippi River and its tributaries below St. Louis was cancelled, that plaintiff was authorized to operate said barge and towboats on the Mississippi River and its tributaries below St. Louis only at rates not less than the all rail rates except in such cases and as to such transactions and commodities as the Secretary of War should, on application to him, have previously specifically consented to and approved, and that plaintiff was authorized to transport on the Mississippi River and its tributaries below St. Louis at 80% of the all rail rates certain specified commodities for the transportation of many of which there was no great demand, but that he would be permitted to transport grain, for the transportation of which there was great demand, on the Mississippi River and its tributaries below St. Louis only in so far as it was available over and above
9 the capacity of the Mississippi Warrior Service to handle such commodity and only in such amounts and on such dates as said Mississippi Warrior Service would determine. At the same time the Secretary of War or another officer of the United States, caused the widespread circulation in St. Louis and elsewhere in the Mississippi River Valley of rumors and reports that plaintiff's right to operate said barges and towboats as a common carrier was subject to the restrictions which the Secretary of War had attempted to place thereon as hereinbefore alleged, that plaintiff was not performing his obligation to operate said barges and towboats as a common carrier and was in default under his contract, and that it was probable that said contract would be terminated and said barges and towboats taken from plaintiff. The Secretary of War and other officers of defendant then well knew plaintiff would be greatly limited and restricted in establishing public confidence in or getting business for said barges and towboats under such restrictions and against the competition of said Mississippi Warrior Service which continued to operate at rates of 80% of the all rail rates. The foregoing acts impaired the confidence of the public in plaintiff's operation of said barges and towboats as a common carrier and prevented many shippers from dealing with plaintiff and were designed and committed for the purpose of preventing plaintiff from competing with said Mississippi Warrior Service and putting him ostensibly in default in the performance of his obligations under said original and supplementary contracts and thereby eventually securing said barges and towboats for said Mississippi Warrior Service.

XI. On or about July 15, 1922, plaintiff duly delivered
10 to the United States the insurance and bonds required to be furnished under said original contract and said barges and towboats were delivered to him.

XII. Until said barges and towboats were placed into winter quarters as hereinafter alleged plaintiff operated them as a common carrier in accordance with said original contract to the extent to which it was possible to so operate them, and was prevented from operating them to a greater extent by the following circumstances:

(1) At the time when they were delivered to plaintiff said barges and towboats were incomplete or defective and were not fit or ready for the purposes contemplated in said original contract and consequently plaintiff had to lay them up for some time and test said towboats and expend considerable money on them for necessary alterations and repairs in order that they could be used for such purposes and was therefore delayed in commencing the operation of said barges and towboats.

(2) During the navigable season of 1922 the water in the Mississippi River and its tributaries was exceedingly low and navigation in certain portions thereof where plaintiff might otherwise have operated said barges and towboats was for the greater portion of such period impossible.

(3) The acts of officers of the United States alleged in Paragraph X hereof prevented plaintiff from obtaining business which he could otherwise have obtained.

XIII. Navigation was closed on the Mississippi River during the winter of 1922–1923 because of ice and low water and
11 was not reopened until about March 1923, and said barges and towboats were put into winter quarters in the latter part of November 1922, and kept there until about March 1923, with the consent of the lessor and the United States.

XIV. On or about December 13, 1922, with knowledge that said barges and towboats were in winter quarters with the consent of the lessor and the United States, the Secretary of War caused plaintiff to be notified that he would thereafter be permitted to carry grain at 80% of the all rail rates without the restrictions referred to in Paragraph X hereof.

XV. On Sunday, March 25, 1923, when plaintiff had taken said barges and towboats out of winter quarters and was getting them ready to resume operations, the United States, acting by and through one T. Q. Ashburn, a United States Army officer who was then in charge of said Mississippi Warrior Service, and other officers and agents of the United States under orders of the Acting Secretary of War, by force and arms, without the consent and against the protest of plaintiff's representatives, seized said barges and towboats and turned them over to said Mississippi Warrior Service for the use and benefit of the United States. Since the seizure of said barges and towboats, except during a

period when plaintiff was permitted to operate them under an order of court, they had been held and operated, directly or indirectly, by and for the use and benefit of the United States and plaintiff has been deprived of the possession, use and benefit thereof and has been deprived of the use and benefit of said unloading facilities in connection with the operation of said barges and towboats.

12 XVI. The lessor has never terminated said original contract or said supplemental contract, and it has never been the judgment of the lessor that plaintiff failed to comply with his obligation to operate said barges and towboats as a common carrier or that plaintiff failed to comply with any other term or condition of said original contract or said supplemental contract. During all the time that plaintiff had been in possession of said barges and towboats the special representative of the lessor whose duty it had been to superintend the performance by plaintiff of his obligations under said original and supplemental contract had been satisfied that plaintiff had duly performed all of said obligations as far as he was permitted to do so by the Secretary of War. The seizure of said barges and towboats was not based upon the exercise of judgment by the lessor or by any other officer of the United States who had authority to make such a determination that plaintiff had failed to comply with any obligation, term or condition of said original contract or said supplemental contract, but was an attempt arbitrarily and in bad faith on the part of the United States, and certain of its officers, acting for and on behalf of the United States to deprive plaintiff of the possession of and right to operate said barges and towboats and to secure them for said Mississippi Warrior Service for the use and benefit of the United States.

XVII. On or about April 27, 1923, the Chief of Engineers signed a letter purporting to terminate said original and supplemental contracts on the ground of alleged failure of plaintiff to operate said barges and towboats as a common carrier. Said letter was not written, dictated or drafted by said Chief of Engineers. It did not represent his independent judgment or

13 any decision, judgment or opinion of his on the merits of the question whether plaintiff had failed to operate said barges and towboats as a common carrier. It was presented to him late in the afternoon by a man calling himself a representative of the Department of Justice, who said that the letter was sent to the Chief of Engineers by the Secretary of War and was to be signed by the Chief of Engineers. Being unable to get into contact, personally or by telephone, with the Secretary of War the Chief of Engineers talked by telephone with the secretary of the Secretary of War and asked if it was the Secretary's order

that he should sign the letter and was told that the Secretary of War had left very positive instructions for him to sign the letter. He also called up the office of the Judge Advocate General of the Army but was unable to reach the Judge Advocate General. He then asked for the Senior Officer present who advised him that the Secretary of War's instructions that he sign the letter constituted a legal order with which he as an officer subordinate to the Secretary of War was required to comply. No time was given the Chief of Engineers for consultation because the representative from the Department of Justice was very peremptory about having the letter signed, saying that he was leaving for St. Louis that afternoon and must take the letter with him. Said letter was signed by the Chief of Engineers only because he was advised that he had to sign it. Moreover it was written more than a month after said barges and tow boats had already been seized and was procured and used by counsel for the United States appearing in various courts of the United States in an effort to justify said seizure.

14 XVIII. Prior to the seizure of said barges and towboats, in order to exercise his option under said original and supplemental contracts to purchase said barges and towboats and said unloading facilities, plaintiff designated one person familiar with the construction and cost of river vessels of steel and with the current market values thereof to act as appraiser under said contracts and requested the lessor to appoint another person to act as a second appraiser under said contracts and did all other acts if any on his part necessary to be done in order to entitle him to exercise said option, and again, in or about December, 1924, plaintiff made a similar attempt to exercise said option, but the lessor, acting in his capacity as Chief of Engineers and as the lessor under said contracts and acting for and on behalf of the United States, refused and failed, and he and his successors as Chief of Engineers and as lessor have ever since refused and failed to appoint an appraiser or to do any other act on the part of the lessor required to effect or accomplish the exercise of said option, by reason whereof plaintiff has been prevented from exercising said option.

XIX. At the time when said original and supplemental contracts were made and at all times thereafter, to the knowledge of the United States, it was and has been plaintiff's purpose to exercise his option to purchase said barges and towboats and said unloading facilities and operate the same as a common carrier and as a private carrier and also rent the same to others, and by so doing earn profits and rents, and it was contemplated by the parties to said contracts at the time when the same were made that said purpose should be effected. At the times of the acts

complained of and at all times thereafter it was and has
15 been impossible to purchase similar barges and towboats suitable for such purpose, or on such favorable terms as to payment as those contained in said original contract, and the United States knew at said times that it would be impossible to purchase similar barges and towboats suitable for such purpose or on such favorable terms.

XX. (1) When said barges and towboats were delivered to plaintiff, said towboats were incomplete and defective and it was necessary for plaintiff to make certain alterations and repairs thereon as alleged in Paragraph XII (1) hereof, and plaintiff spent for such alterations and repairs the amount of $13,061.05, which was the reasonable value and cost thereof.

(2) When said barges and towboats were returned to plaintiff temporarily under the order of court referred to in Paragraph XV hereof, it was necessary for plaintiff to make certain repairs on said towboats to repair injuries thereto caused by the acts of the United States and its officers subsequent to the seizure thereof, and plaintiff had to spend for such repairs the amount of $79,474.52, which was the reasonable value and cost thereof.

(3) When said barges and towboats were seized, plaintiff had on board one of said towboats fuel oil and other supplies, the personal property of plaintiff, for which plaintiff had paid and the reasonable value of which was $5,038.44, which the United States and its officers seized and appropriated to the use and benefit of the United States.

16 (4) In compliance with his obligations under said contracts, plaintiff furnished certain insurance and bonds for which he had to spend $52,845.03, which was the reasonable value and cost thereof.

XXI. As hereinabove shown, the United States violated and failed and refused to perform the terms and conditions of said original and supplemental contracts on its part to be performed and interfered with and prevented complete performance by plaintiff of the terms and conditions of said contracts on his part to be performed and said barges and towboats were taken from plaintiff by the United States under orders of the Acting Secretary of War for the use and benefit of the United States.

XXII. Plaintiff has ever been ready, willing, and able to perform the terms and conditions of said original and supplemental contracts on his part to be performed. During the time when he had possession of said barges and towboats plaintiff duly performed his obligations under said original contract to operate said barges and towboats as a common carrier, to pay operating expenses, to maintain said barges and towboats in good condition, to hold the United States free from liability, to discharge

liens, to procure insurance and bonds, to keep accurate detailed accounts, to turn over and deposit net earnings, and all the terms and conditions necessary to be performed by him to exercise his option to purchase said barges and towboats and entitle him to an appraisal and transfer of title to the same, and all the other terms and conditions, if any, of said original contract on his part to be performed, and his obligations under said supplemental contract, within eight months after the date thereof to provide the necessary land and runway for said unload-
17 ing facilities, to provide insurance for the benefit of the United States, to maintain and operate said unloading facilities in connection with said barges and towboats as a common carrier, and all the terms and conditions necessary to be performed by him to exercise his option to purchase said unloading facilities and entitle him to an appraisal and transfer of title to the same, and all the other terms and conditions, if any, of said supplemental contract on his part to be performed—except in so far as he was prevented and excused from such performance by the circumstances and the wrongful acts of the United States and certain of its officers and agents hereinabove alleged, but for which he would have fully performed all of said terms and conditions.

XXIII. By reason of the acts herein complained of, plaintiff has suffered loss and damage in connection with said barges and towboats as follows:

(1) Plaintiff was deprived of the benefit of said original and supplemental contracts.

(2) Plaintiff was deprived of the benefit of his equitable interest in said barges and towboats and said unloading facilities.

(3) Plaintiff was deprived of the benefit of his option to purchase said barges and towboats and said unloading facilities.

(4) Plaintiff was deprived of the opportunity to make profits which he could have made with said barges and towboats and said unloading facilities but for said acts.

(5) Plaintiff was deprived of the value of the use of said barges and towboats and said unloading facilities during the period in which he was deprived of the possession of said barges and towboats.

18 (6) Plaintiff spent $13,061.05 for alterations and repairs as alleged in Paragraph XX (1) hereof.

(7) Plaintiff spent $79,474.52 for repairs as alleged in Paragraph XX (2) hereof.

(8) Plaintiff spent $5,038.44 for fuel oil and other supplies as alleged in Paragraph XX (3) hereof.

(9) Plaintiff spent $52,845.03 for insurance and bonds as alleged in Paragraph XX (4) hereof.

By reason of the matters hereinabove set out in this first cause of action, plaintiff has suffered loss and damage in the sum of $10,150,419.04, which sum together with interest thereon is the just compensation to which plaintiff is entitled for such losses and damage so suffered by plaintiff.

XXIV. Plaintiff believes the facts stated in this cause of action to be true. No action has been taken on this claim in any of the departments, other than as above set out, and no action has been taken thereon in Congress except in connection with the enactment of Private Act No. 69 referred to in Paragraph II hereof; there is not now pending any suit or process in any court on the aforementioned matters; no person other than plaintiff is the owner thereof or interested therein; no assignment or transfer of said claim or of any part thereof or of interest therein has been made; plaintiff has not been paid the amounts herein claimed or any part thereof and is justly entitled to the amounts herein claimed from the United States after allowing all just credits and offsets; plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

19 FOR A SECOND CAUSE OF ACTION

XXV. Plaintiff repeats and realleges each and every allegation contained in Paragraphs I to XIX and XXI and XXII hereof inclusive with the same force and effect as if they were herein set forth in full.

XXVI. Plaintiff, in compliance with his obligation under said supplemental contract, provided at his own expense the necessary tract of land and runway at 6500 South Broadway, St. Louis, Missouri, on which said unloading facilities were to be erected, stand and operate and ever since that time he has been the owner in fee of said tract of land and said runway.

XXVII. The United States, in compliance with its obligations under said supplemental contract, erected said unloading facilities on said tract of land and runway and from about March 24, 1923, to about September 4, 1924, and from about July 1, 1926, to about August 31, 1930, said tract of land and runway were used and occupied by the United States for said unloading facilities and plaintiff was deprived of the use and occupation and the rental value thereof.

XXVIII. The reasonable rental value of said tract of land and runway during the time that they were used and occupied by the United States as alleged in Paragraph XXVII hereof was $50,037.73.

XXIX. During the time that said tract of land and runway were used and occupied by the United States for said unloading facilities as alleged in Paragraph XXVII hereof said unloading facilities were left by the United States in plaintiff's care and plaintiff had to employ watchmen to care for the same and had to pay said watchmen the amount of $16,841.25, which was the reasonable value of their services.

20 XXX. Said unloading facilities were and are of no value to plaintiff unless he could use the same and detract from the value of said tract of land and the reasonable expense of removing the same from said tract of land will exceed the value thereof when removed by at least $35,000.

XXXI. Plaintiff had to spend for said runway the amount of $36,061.49, which was the reasonable value and cost thereof.

XXXII. Said runway is of no value to plaintiff and detracts from the value of said tract of land and the reasonable expense of removing the same from said tract of land will exceed the value thereof when removed by at least $2,500.

XXXIII. Plaintiff was deprived of the use of said unloading facilities from about March 24, 1923, to September 4, 1924, and since July 1, 1926. The reasonable rental value and value of the use of said unloading facilities exclusive of land and runways is $25,000 per year.

XXXIV. By reason of the matters set forth in this second cause of action, plaintiff has suffered loss and damage in the sum of $377,940.47, which sum together with interest thereon is the just compensation to which plaintiff is entitled for such losses and damage so suffered by plaintiff.

XXXV. Plaintiff made claim with the War Department for reimbursement of the loss and damage which he had

21 suffered because of the acts and things alleged in this cause of action and said department failed and refused to pay the same or any part thereof.

XXXVI. Plaintiff believes the facts stated in this cause of action to be true. No action has been taken on this claim in any of the departments except as alleged in Paragraph XXXV hereof and no action has been taken thereon in Congress except in connection with the enactment of Private Act No. 69 referred to in Paragraph II hereof; there is not now pending any suit or process in any court on the aforementioned matters; no person other than plaintiff is the owner thereof or interested therein; no assignment or transfer of said claim or of any part thereof or of interest therein has been made; plaintiff has not been paid the amounts herein claimed or any part thereof and is justly entitled to the amounts herein claimed from the United States after allowing all just credits and offsets; plaintiff has at all times borne true

allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

Wherefore, plaintiff prays judgment against the United States upon the facts and the law in the amount of $10,528,359.51 with interest, together with the costs and disbursements of this action, and for such other relief as to the court may seem just.

HUGHES, SCHURMAN & DWIGHT,
100 Broadway, New York, New York,
Attorneys for Plaintiff.

KING & KING,
728 Seventeenth Street, Washington, D. C.
Of Counsel.

22 *Duly sworn to by Edward F. Goltra; jurat omitted in printing.*

23 *Exhibit A to petition*

(Private—No. 69—74th Congress)

(S. 1091)

AN ACT.

Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whereby tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: Provided further, That either party may appeal as of right to the Supreme Court of the United States

from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid.

Approved, April 18, 1934.

24 *Exhibit B to petition*

1. This lease, made this 28th day of May 1919, between the United States of America, represented by Major General William M. Black, Chief of Engineers, United States Army, directed by the Secretary of War so to represent the United States, hereinafter designated as the lessor, party of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, hereinafter designated as the lessee, his heirs, executors and administrators, party of the second part, witnesseth, that

Whereas, the party of the second part at the request of certain government officials as an emergency of war, in order to increase the output of pig iron, made certain arrangements for iron ore and coal properties with a view to producing pig iron at St. Louis, Missouri; and

Whereas, the United States Shipping Board Emergency Fleet Corporation, allotted to the Chief of Engineers the sum of $3,860,000 for the construction of a fleet of towboats and barges for the primary purpose of transporting the said iron and coal to and from St. Louis, Missouri; and

Whereas, on the first day of August 1918, the United States of America entered into contracts for the construction of nineteen barges suitable to use for the transportation of said iron ore and coal; and

Whereas, the United States of America is about to construct by contract or otherwise a fleet of towboats for the purpose of towing the said barges, the construction of which in the opinion of the Secretary of War is necessary to enable the government to dispose of the said barges more advantageously; and

25 Whereas, the said fleet of towboats and barges is especially designed for and adapted to the transportation of iron ore and coal; and

Whereas, the said lessee has entered into various engagements and undertakings to increase the pig iron supply as a war measure, which may have created, and according to the contention of the lessee did create obligations on the part of the United States to the said lessee, but which he entirely releases and discharges in part consideration of this lease, which engagements, undertakings, and lease are in furtherance of the original design

for the assembling of coal and iron ore at St. Louis, Missouri, and for the increase of pig iron facilities;

Now, therefore, the said lessor doth hereby charter and lease unto the said lessee for a term of five (5) years, beginning with the date of delivery to the lessee of the first barge or towboat and terminating five (5) years after the delivery of the first barge or towboat the following described property, viz:

Nineteen barges which are being constructed under contracts dated August 1, 1918, with the Marietta Manufacturing Company, of Point Pleasant, W. Va., the Dravo Contracting Company, of Pittsburgh, Pa., and the Dubuque Boat & Boiler Works, of Dubuque, Ia., and three or four towboats about to be constructed and described in accordance with specifications prepared or to be prepared therefor.

It is thereupon covenanted and agreed between the said parties as follows:

2. (a) That the said lessee shall operate as a common carrier the said fleet of three or four towboats and nineteen barges upon the Mississippi River and its tributaries for the period of the lease and of any renewals thereof, transporting iron ore,
26 coal and other commodities at rates not in excess of the prevailing rail tariffs, and not less than the prevailing rail tariffs without the consent of the Secretary of War; but nothing herein shall be deemed to prevent the most profitable and most advantageous use of said vessels being made provided the Secretary of War consents to such use other than as a common carrier.

(b) That the lessee shall pay all operating expenses of the fleet and maintain, during the continuance of the lease, each towboat and barge of the fleet in good operating condition to the satisfaction of the lessor; and shall hold the United States entirely free from all liabilities and indebtedness of every kind in connection with the operation, care, and maintenance of the entire fleet and all its engines, boilers, outfit, tackle, apparel, furniture, and appurtenances; and the lessee shall, without unnecessary delay, as soon as he acquires any knowledge thereof, discharge any and all maritime liens that may at any time during the continuance of this lease from any cause arise against or become impressed upon any one, any, or all of the fleet of nineteen barges and three or four towboats. The lessee shall procure and take out for the benefit of the United States, insurance, both fire and marine, in such an amount as in the judgment of the Secretary of War each of the vessels may require and with such underwriters or in such companies as are approved by the lessor, insuring each and every one of the barges and towboats against physical injury to them, or any of them, and against the loss

of any or all of the barges and towboats hereby leased. The lessee shall likewise procure and take out fire, marine, and towers liability insurance in such an amount as in the judgment of the Secretary of War each of the vessels may require with such underwriters or in such companies as shall be approved
27 by the lessor, and for the benefit of the United States, insuring each of the vessels against such injury as may be inflicted by such vessel upon other property, such as might result in maritime liens, or in liability or obligation by the lessor and, if the lessor shall require, execute and deliver to the lessor, a bond in the penal sum of Three Hundred Thousand ($300,000.00) Dollars, conditioned to protect the United States against such liability or obligation and against any and all maritime or other liens against the fleet or any of the vessels of the fleet and against any and all depreciation in value of all or any of said vessels, by reason of maritime or other liens arising or becoming impressed upon them or any of them. Such bonds as in any part of this contract are required to be given by the lessee for the benefit of the United States shall always and at all times during the continuance of this lease be kept good and shall be replaced at any time by other good and sufficient bonds at the request of the lessor, and they shall be kept good not only against the impaired credit or financial responsibility of the obligor or surety, but also against partial depletion or entire exhaustion thereof brought about by the payment of losses or indemnities thereunder.

(b–1) All salvage earned, to which any of the said fleet shall become entitled, shall be for the benefit of the United States, after deducting all expenses incident thereto and the proportion due to the master, officers and crew.

(c) For the protection of persons furnishing materials, services and labor in connection with the operation, furnishing, repair care and maintenance of the said towboats and barges, the lessee shall furnish to the lessor and continue in effect during the period of the lease, and in case of sale until title passes to the pur-
28 chaser, a good and sufficient bond, approved by the lessor, in the penal sum of two hundred thousand ($200,000) dollars.

3. The net earnings above operating expenses and maintenance for each and every ton of cargo moved and all other net earnings shall be turned over by the lessee to the Secretary of War as soon as practicable after each proper determination of the amount thereof but at least every ninety days, for deposit with the Treasurer of the United States to the credit of the Secretary of War in a special deposit account and shall continue so to be turned over to him and so deposited by him until such time as said net earnings

shall equal the full amount of the cost of the several vessels of the fleet plus interest on said cost at 4 per cent per annum computed from the respective dates of delivery of the several vessels of the fleet and that thereafter all net earnings over and above the full amount of the said cost of the several vessels of the fleet, plus interest on said cost at 4 per cent per annum, shall be deposited to the credit of the Secretary of War at least every ninety days by the lessee in one or more national banks in St. Louis, Missouri, to be designated by the lessor, to be held for the fulfillment of the terms of this lease, provided that earnings derived from the transportation of commodities in barges hereby leased, moved by towboats not furnished by the United States, shall until all vessels of the government fleet are delivered to the lessee, be subject to deduction of cost of the hire of the necessary towboats to move said barges, in addition to any other operating expenses and maintenance in connection therewith.

The lessee shall keep accurate detailed accounts of all
29 tonnage moved and of all moneys received and due, and of all items of operating costs, and his accounts shall at all times be subject to inspection by the lessor, or his representatives. The overhead expenses included in operating costs shall be subject to the approval of the lessor and any items not approved by him and to which the lessee may object or take exception shall be referred to the Secretary of War, whose decision shall be final.

4. The approved national banks shall be required to furnish good and sufficient bonds, approved by the lessor, in penal sum in amounts at least equal to the sum deposited conditioned for the safety of the funds held on deposit, as provided in this lease, said bonds to be delivered to the custody of the lessor and to be maintained during the period of the deposit. The said banks shall credit to the account interest at the local prevailing rates of non-checking accounts.

5. Within three months prior to the expiration of the lease, or of any period of renewal, or sooner if so desired by the lessee, a board of three persons shall be appointed, one to be designated by the lessor, one by the lessee and one by the said two members unless they shall fail to agree, in which case the third member shall be appointed by the Secretary of War, all of whom shall be familiar with the construction and cost of river vessels of steel and with the current market values thereof, to appraise the value of the said fleet at that time, and the said lessee shall be given the option of purchasing the fleet upon the following terms:

(a) If the funds turned over to the Secretary of War and deposited by him with the Treasurer of the United States,
30 under section 3 of this lease, shall aggregate a sum equal to the full amount of the cost of the several vessels of the

fleet, plus interest on said cost at 4 per cent per annum as aforesaid, then in case of the exercise of said option by the lessee said funds shall be applied to payment in full for the fleet, and any net earnings over and above the amount required for such payment on deposit in said bank or banks, provided in section 3 of the lease, or otherwise held on deposit, shall be paid to the lessee.

(b) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, under section 3 of this lease, shall be less than the full amount of the cost, plus accrued interest at the rate of 4 per cent per annum on such cost, but greater than the appraised value, the funds shall in said event be applied to payment of the fleet at the appraised value, and any amount in excess of the appraised value shall be retained by the Secretary of War for the use and benefit of the United States; and the fleet shall thereupon become the property of the lessee.

(c) If the funds turned over to the Secretary of War and by him deposited with the Treasurer of the United States, as provided by section 3 of this lease, shall be less than the appraised value, then in the event aforesaid such funds shall be applied to the payment of the fleet so far as they shall reach, and the lessee shall pay in addition thereto, in the manner specified in section 6 hereof, the amount whereby the aggregate funds so turned over to the Secretary of War fall short of the said appraised value.

6. It is further covenanted and agreed that the method of payment of any amount which the purchaser shall be required to pay, and not provided for out of the sums deposited to the credit of the Secretary of War shall be as follows:

31

There shall be sixteen (16) payments. The first shall consist of all moneys on deposit to the credit of the Secretary of War, as indicated above, and shall be so applied at the date of the sale. The Lessee shall execute for the balance fifteen (15) promissory notes, in equal amount, payable at the expiration of one year, two years, three years, etc., from date of sale with interest at 4 per cent per annum. Title to the property shall remain in the United States until the payment of the whole of the purchase price of said property.

7. It is understood and agreed that the lessee assumes full responsibility for the safety of his employees, plant and materials, and the said nineteen barges and three or four towboats, and for any damage or injury done by or to them and from any source or cause in the operation of the fleet.

8. The lessor reserves the right to inspect the plant, fleet, and work at any time to see that all the said terms and conditions

of this lease are fulfilled, and that the crews and other employees are promptly paid, monthly or oftener; and noncompliance, in his judgment, with any of the terms or conditions will justify his terminating the lease and returning the plant and said barges and towboats to the lessor, and all moneys in the Treasury or in bank to the credit of the Secretary of War shall be deemed rentals earned by and due to the lessor for the use of said vessels.

9. In the performance of the conditions of this lease, the employment of persons undergoing sentences of imprison-
32 ment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

10. No member or delegate to Congress, or resident commissioner, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom; but under the provisions of section 116 of the act of Congress approved March 4, 1909 (35 Stats. 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend or be construed to extend, to any contract made with an incorporated company for its general benefit.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

JOHN STEWART, as to
Lt. Col. of Engineers.

WILLIAM M. BLACK [SEAL]
Major General,
Chief of Engineers,
U. S. Army (First Party).

———— ————, as to
Lt. Col. Engr.

EDWARD F. GOLTRA [SEAL]
(Second Party).

The insertion of the words "three or" in the thirteenth and nineteenth lines of page 2, the seventh line of page 3, and the fifteenth line of page 7 are correct and were made before the contract was completed.

WILLIAM M. BLACK,
Maj. Gen. Chief of Engr.,
First Party.

EDWARD F. GOLTRA,
Second Party.

33 It is further understood and agreed between the said William M. Black, Chief of Engineers, United States Army and Edward F. Goltra, parties of the first part and of the second part respectively of the above contract that the num-

ber of tow boats to be supplied under the above contract, denominated "three or four" therein, shall be at least three and that a fourth shall be supplied only in the event that four suitable tow boats of the general type and power described in the request for proposals now being canvassed for four tow boats for the upper Mississippi River can be obtained, with the funds available as specified in the second whereas of the above contract, and not otherwise.

WILLIAM M. BLACK.
Witness:
JOHN STEWART,
Lt. Col. of Engineers.
EDWARD F. GOLTRA.
Witness:
JAMES M. HOFFMAN,
Capt. Engrs. U. S. A.

34 *Exhibit C to petition*

WAR DEPT., ENGINEERS.
Form 19b.

Whereas, On the twenty-eighth day of May 1919, a contract was entered into between Major General W. M. Black, Chief of Engineers, U. S. Army, who, as well as his legally appointed successor, is hereinafter designated as the lessor, representing the United States of America, of the first part, and Edward F. Goltra, of the City of St. Louis, State of Missouri, his heirs, executors, administrators, or assigns, hereinafter designated as the lessee, of the second part, for chartering and leasing unto the lessee for a term of five years, subject to renewals, nineteen (19) barges and four (4) tow boats, belonging to the United States.

And whereas, it is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

To more fully provide for the operation of the said barges and towboats as a common carrier by providing unloading facilities at St. Louis, Mo., by the use of funds remaining from the allotment of $3,860,000.00 from the United States Shipping Board Emergency Fleet Corporation, and to provide for the sale of the said unloading facilities to the lessee under certain conditions.

Now, therefore, The said contract is, by this Supplemental Agreement between Major General Lansing H. Beach, Chief of Engineers, U. S. Army, and the said contractor, on this 26th day

of May, 1921, hereby modified in the following particulars, but in no others :

35 The lessee will, at his own expense, within eight (8) months from the date hereof, provide the necessary tract of land and run-way on which the said unloading facilities are to be erected, stand and operate, said tract to be selected by the lessor, subject to approval by the lessee, and said run-way to be built according to plans submitted by lessee and approved by the lessor.

The lessor will erect on the said tract of land an unloading apparatus or facilities of a kind and character mutually agreed to by lessor and lessee as sufficient and adequate to handle the cargoes to be transported by the said barges and towboats.

The said lessee shall, at his expense, maintain and operate the said unloading facilities in connection with the barges and towboats as a common carrier, subject to such charges for services of loading and unloading as may be approved by the Secretary of War.

The said lessee shall take out and maintain for the benefit of the United States insurance in such amount and with such companies as may be approved by the lessor.

The terms of the original lease as to net earnings (paragraph 3) appraisement and option to purchase, and conditions of purchase (paragraph 5), method of payment in the event of purchase (paragraph 6), inspection (paragraph 8) shall govern so far as applicable and pertinent to the said unloading facilities.

In case the said lessee, his heirs, administrators, executors, or assigns, does not take over and pay for the said unloading facilities according to the aforesaid terms, then and in that case

36 the lessor may, without let or hindrance by the said lessee, his heirs, administrators, executors or assigns, take said unloading facilities in the same manner as is provided in the original lease as to the barges and towboats, or

In case the lessor does not desire to remove the said unloading facilities under the preceding paragraph, the lessor shall have the right to lease the land and runways on which the unloading facilities stand, for five (5) years with the privilege of renewals, the terms of such lease, if not mutually agreed to by the lessor and lessee, to be fixed by a board of three persons, one member to be selected by the lessor, one member by the lessee, and one member by agreement between the two aforesaid members.

This supplemental agreement shall be subject to the approval of the Secretary of War.

In witness whereof the parties aforesaid have hereunto placed their signatures at the time of execution of this agreement.

Witnesses:

P. J. DEMPSEY as to LANSING H. BEACH,
Major General, Chief of Engineers.

THOMAS M. ROBINS as to EDWARD F. GOLTRA,
Major, Corps of Engineers.

(Executed in Triplicate)

Approved May 27, 1921.

J. M. WAINWRIGHT,
Assistant Secretary of War.

37 II. *General traverse*

Filed August 29, 1934

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

GEO. C. SWEENEY,
Assistant Attorney General.

III. *Special answer*

Filed April 5, 1937, by leave of court

Comes now the defendant, by James W. Morris, Esq., Assistant Attorney General, and for cause of filing this Special Answer states that the defendant reaffirming its general traverse to the petition denies each and every allegation of the petition therein alleged and by way of special defense to the second cause of action alleged in said petition states—

I

The defendant alleges on information and belief that the plaintiff is not the owner of and does not have valid title to the property referred to in paragraph XXVI of the petition, and that he was not such owner and did not have such title at any of the times referred to in the petition.

38 The defendant further alleges on information and belief that the original Western Bank of the Mississippi River was on the Eastern edge of Front or Water Street, which said Front or Water Street is the eastern boundary of Block 2977 of the present City of St. Louis.

That the original Town of Carondelet was surveyed and laid out in 1832, and said survey shows lots and blocks on record in Plat Book No. 2, page 68, of the land records of the City of St. Louis, Missouri, showing on said plat a tow path or Water Street about 70 feet, English measure, and that said tow path or Water Street was immediately east of said original survey and plat of Blocks 11, 12, 13, 14, and 15, and that there was no individual riparian ownership on said river bank, the nearest riparian ownership to said river bank being on the west side of the tow path or Water Street; that the numberings of the original blocks as set out on the survey above referred to has since been changed and names of original streets are different, and what was originally known as L Street or Lafayette Street is now Soper Street, and what was originally Block 13 of the Town of Carondelet is now Block 2977 of the City of St. Louis. Since the filing of the original plat of the Town of Carondelet, as above referred to, due to accretions, both natural and artificial, the West bank of the Mississippi River is now approximately 535 feet east of the said original "a tow or Water Street or Front Street,"
39 which has never been platted nor dedicated and has never been assessed by the Taxing Authorities for the State, County, City, or other Municipal purposes, and the title to said accretions has never been divested out of the State nor any Municipal subdivision thereof. That said petitioner is claiming title to said accretions by virtue of a quitclaim deed executed to him in 1921 from the owner of a plot of ground beginning at the southeast corner of Block 2977 and running northeast 70 feet, thence northwest 122 feet 11 inches, thence southwest 70 feet, thence southeast 122 feet 11 inches, to point of beginning, containing a tract of land 70 feet by 122 feet 11 inches. That the title to said accretions claimed by said petitioner are on the east side of Front or Water Street, 70 feet wide, running southeastwardly to the West Bank of the Mississippi River. That said accretions are the property referred to in paragraph XXVI of the petition.

That there are several claimants to said land described in said quitclaim deed of the petitioner and that F. G. Thurman has been in possession of part of said land under color of deed since January, 1924, and that, on information and belief, he and those under whom he claims have been in possession of part of said lands claiming title for more than twenty years.

II

The defendant alleges that a large part from two-
40 thirds to three-fourths of the runways referred to in paragraph XXXVI of the Petition have been erected on the

land owned by the Mississippi Valley Iron Company, a corporation.

Wherefore, defendant prays that petitioner's second cause of action be dismissed.

W. W. SCOTT,
Acting Head, Claims Division.

SAM M. WASSELL,
ALEXANDER HOLTZOFF,
Attorneys.

41 IV. *Counterclaim*

Filed July 15, 1937, by leave of Court

Now comes the defendant by Sam E. Whitaker, Assistant Attorney General, and without waiving any of the defenses under the general traverse and special answer heretofore filed, by way of counterclaim states that the plaintiff, Edward F. Goltra, is indebted to the defendant in the sum of $4,817.88 as follows:

That on or about September 1, 1925, the defendant acting by the Engineer of the War Department at Memphis, Tennessee, delivered to the plaintiff, for use on the Steamer "Illinois," 657.7 barrels of fuel oil, on or about September 7, 1925, 1,368.1 barrels of fuel oil, and on or about September 26, 1925, 1,543 barrels of fuel oil; or in the aggregate 3,568.8 barrels of fuel oil. That the plaintiff used said fuel oil in operating said steamer. That the fair and reasonable value of said fuel oil was $1.35 per barrel,
42 or a total of $4,817.88, which the plaintiff promised and became obligated to pay to the defendant. That demand has been made for the payment of the same and payment has been refused.

Wherefore, the defendant prays judgment against the plaintiff for the sum of $4,817.88, with interest on the sum of $887.89 from September 1, 1925, until paid; on the sum of $1,846.93 from September 7, 1925, until paid; on the sum of $2,083.05 from September 26, 1925, until paid, and all other relief previously prayed for.

Respectfully submitted.

SAM E. WHITAKER,
Assistant Attorney General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
SAM M. WASSELL,
Attorney.

43 V. *Defendant's second counterclaim*

Filed Dec. 2, 1937, by leave of Court.

Now comes the defendant, by its Assistant Attorney General, and by leave of the Court first had and obtained files its second counterclaim herein as follows:

On or about June 15, 1928, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, his income tax return for the year 1927, showing a net loss for the year and no tax due, whereas in fact the plaintiff had a net income for said year subject to income tax, amounting to $38,696.70, and the tax thereon amounted to the sum of $1,697.92, which the plaintiff failed to pay and for which he is indebted to the defendant with interest thereon. On or about December 7, 1931, plaintiff executed and filed with the Commissioner of Internal Revenue a consent that an assessment of income tax due from the plaintiff for the year 1927 might be made by said Commissioner on or before
44 December 31, 1932, except that if a notice of deficiency in tax was sent to the taxpayer on or before that date, the time for making assessments should be extended beyond that date by the number of days during which the Commissioner was prohibited from making an additional assessment, and for sixty days thereafter.

On or about December 29, 1932, a notice of deficiency for the year 1927 in the amount of $1,697.92 was mailed by the Commissioner of Internal Revenue to the plaintiff. On or about March 18, 1933, within the time extended by the said consent of December 7, 1931, the Commissioner of Internal Revenue assessed as the tax of the plaintiff for the year 1927 the sum of $1,697.92, together with interest thereon in amount of $510.21, aggregating the sum of $2,208.13. Notice of the assessment was given to the plaintiff, and demand for payment was made by the Collector of Internal Revenue on or about March 22, 1933; and on April 11, 1933, the Collector granted an extension of time for the payment of this amount to March 1, 1934. Said amount has not been paid by the plaintiff. Wherefore, the plaintiff is indebted to the defendant in the sum of $2,208.13 with interest, as provided by law.

On March 14, 1930, plaintiff filed with the Collector of Internal Revenue of St. Louis, Missouri, a tentative income tax return for the year 1929, disclosing no net income and no tax due, whereas, in fact, for the year 1929 the plaintiff had a net
45 income subject to income tax in the sum of $22,954.25, and the tax thereon amounted to the sum of $377.26. The time for filing the return for the year 1929 was extended by the Col-

lector to April 15, 1930, but plaintiff has filed no further return for that year.

On or about February 7, 1932, the Commissioner of Internal Revenue mailed to plaintiff a notice of the tax determination for the year 1929. On or about April 27, 1934, the Commissioner of Internal Revenue assessed the tax against plaintiff for the year 1929 in the amount of $377.26, together with a penalty of $94.32 for failure to file a return as required by law, and interest on said tax of $93.17. Notice of said assessment was given and demand for payment was made by the Collector of Internal Revenue on April 30, 1934, but said amount has not been paid by the plaintiff. Wherefore, the plaintiff is indebted to the defendant in the amount of $564.75, with interest as provided by law.

For the year 1930, plaintiff filed no income tax return, whereas, in fact, he had a net income subject to income surtax in the sum of $11,631.49, and the tax thereon amounted to the sum of $16.31, of which the sum of $8.00 had been paid at the source, leaving a balance of $8.31 due and owing. On February 7, 1934, the Commissioner of Internal Revenue mailed to the plaintiff a notice of the tax determination for the year 1930. On or about
46 April 27, 1934, the Commissioner of Internal Revenue assessed a tax for the year 1930 in amount of $8.31, together with a penalty of $2.08 for failing to file a return and interest on the tax of $1.55. Notice of assessment was given and demand for payment thereof was made by the Collector of Internal Revenue on or about April 30, 1934, but said amount has not been paid by the plaintiff. Wherefore, the plaintiff is indebted to the defendant in the sum of $11.94, with interest, as provided by law.

Wherefore, the defendant prays judgment against the plantiff on this counterclaim in the amount of $2,784.82, with interest as provided by law.

SAM E. WHITAKER,
Assistant Attorney General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
SAM M. WASSELL,
HERBERT A. BERGSON,
Attorneys for the United States.

47 VI. *Plaintiff's answer to defendant's second counterclaim*

Filed January 11, 1938

Now comes the plaintiff by his attorney of record and for answer to defendant's second counterclaim says that plaintiff admits the facts set forth in said second counterclaim concerning the

assessment of income taxes as therein set forth and says that he is anxious to pay any and all income taxes which may be due and owing by him to defendant. Plaintiff further says that he has been prevented from paying such income taxes as may be due from him to the defendant because long prior to the year 1927 defendant was indebted to plaintiff in a much larger sum than any taxes so due by plaintiff to defendant but defendant has failed and refused to pay to plaintiff the money so due to him; that had defendant paid to plaintiff the money due to him plaintiff could and would have paid all taxes due by
48 plaintiff to defendant. Plaintiff further says that he has called upon the officers of the Bureau of Internal Revenue and advised them of the fact that he is unable to pay such income taxes as may be due by him to defendant because the defendant has failed and refused to pay to plaintiff the money which defendant owes to plaintiff, and that he would be glad and willing to pay such taxes if and when defendant pays him.

Wherefore, plaintiff prays the Court that if any judgment should be rendered upon defendant's second counterclaim that there should not be included in said judgment any interest or penalties.

DWIGHT, HARRIS, KEOGEL & CASKEY,
Attorneys for plaintiff.

FREDERICK W. P. LORENZEN,
HERMAN J. GALLOWAY,
KING & KING,
Of Counsel.

49 *Duly sworn to by Herman J. Galloway; jurat omitted in printing.*

50 VII. *Suggestion of death of plaintiff and motion to substitute executors*

On April 11, 1939, plaintiff's attorney filed a suggestion of death of plaintiff and a motion to substitute Kate B. Goltra and E. Field Goltra, Jr., as executors, with certified copies of Will, etc. in open court, and said motion was allowed from the Bench.

VIII. *Argument and submission of case*

On April 11, 1939, the case was argued and submitted on merits by Mr. Herman J. Galloway for plaintiff, and by Mr. Alexander Holtzoff for defendant.

51 IX. *Special findings of fact, conclusion of Law, and opinion of the court by Whaley, Chief Justice*

Filed April 1, 1940

Mr. Herman J. Galloway for the plaintiffs. Messrs. Richard E. Dwight, Frederick W. P. Lorenzen, and Dwight, Harris, Koegel & Caskey were on the briefs.

Mr. Alexander Holtzoff, with whom Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Herbert A. Bergson was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. Edward F. Goltra, the original plaintiff in this suit, at all times herein pertinent, was a citizen of the United States and a resident of St. Louis, Missouri.

Since the institution of this suit, Edward F. Goltra on April 2, 1939, departed this life, leaving as his executors Kate B. Goltra and E. Field Goltra, Jr., who have been substituted as plaintiffs. Wherever the word "plaintiff" is used herein, reference is made to Edward F. Goltra and not the executors.

2. The petition herein was filed July 21, 1934, pursuant to Private Act approved by the President on April 18, 1934, as follows:

52 "AN ACT

"Conferring jurisdiction upon the Court of Claims of the United States to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States arising out of the taking of certain vessels and unloading apparatus.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith:

Provided, That separate suits may be brought with respect to the vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act: Provided further, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

3. In the year 1917, after this country had entered the World War, traffic conditions in the Mississippi Valley became acute because of the inadequacy of rail transportation facilities, and defendant investigated the feasibility of developing river transportation facilities. Plaintiff, in cooperation with defendant, at his own risk and expense, conducted practical experiments as to the commercial feasibility of transporting coal from St. Louis to St. Paul and iron ore in the reverse direction by means of barges on the Mississippi River, and also conducted an experimental trip carrying knocked down ballast cars on barges from St. Louis to New Orleans to be sent to the armies of defendant in France. As a result of these experiments the engineers of the Corps of Engineers of the Army obtained information
53 necessary in order to prepare specifications and designs for a fleet of barges for operation on the Mississippi River. Plaintiff reported the results of these experiments to the President of the United States and asked that defendant give financial aid in defraying the cost of building a fleet such as is described in the next finding. Plaintiff offered to take over the vessels when completed, operate them, and reimburse the Government for the cost thereof in any fair manner.

4. Thereafter, as a wartime measure, defendant entered into contracts for the construction of 19 steel barges and planned the construction of 4 steel towboats to tow the barges. The barges and towboats were later built and became the property of defendant.

5. On March 1, 1919, plaintiff sent a letter to the Secretary of War relating to these boats and barges. In that letter he recited facts with respect to his efforts on the Mississippi River in 1917 substantially as stated in Finding 3 and concluded as follows:

"As the whole project will now before long be consummated, I desire to enter into an agreement for the operating and taking over of the whole project. In view of the fact that it has been generally understood that I was to take over the facilities, I have been preparing myself by acquiring the necessary fuel properties and ore properties and real estate for the terminal facilities, and

I feel that I should no longer be left without an agreement reduced to writing covering this matter.

"I respectfully refer you to your letter of the 25th of October 1917, addressed to Mr. E. N. Hurley, and also your letter of December 13, 1918, addressed to the Emergency Fleet Corporation, and to say in conclusion modestly as I can, that the entire inland waterway traffic matter took on form and substance as the direct result of the work I did on the Mississippi River in the Spring and Summer of 1917, and that the Inland Waterways Commission was an afterthought and result of said activities and was formed long after the moral obligation, at least, of turning over these vessels to me was entered into."

6. On May 28, 1919, plaintiff and defendant entered into a contract (hereinafter referred to as the "original contract"), and on May 26, 1921, plaintiff and defendant supplemented the
54 original contract by a contract (hereinafter referred to as the "supplement contract"). Both these contracts were prepared and drafted by the defendant, and were signed by the Chief of Engineers as party of the first part and by the plaintiff as party of the second part. A copy of the original contract is Exhibit B to the petition and a copy of the supplemental contract is Exhibit C to the petition and both are made a part of these findings by reference.

7. At all times herein pertinent and material, there was stationed at St. Louis an officer of the corps of engineers of the United States Army called "District Engineer." Among the functions of this officer was the duty of representing the Chief of Engineers in connection with the performance by the respective parties of the original contract and the supplemental contract and in supervising plaintiff's performance of the contracts.

8. From the year 1920 a fleet of barges and towboats known as the "Mississippi Warrior Service" has been operated in the transportation of freight as a common carrier on the Mississippi River between St. Louis and New Orleans and on the Warrior River. From 1920 to about June 1924 the Mississippi Warrior Service was conducted as one section of a division in the War Department known as the Inland and Coastwise Waterways Service, and from about June 1924 until the present time it has been conducted by Inland Waterways Corporation, a corporation organized under chapter 243 of the Act of Congress of June 3, 1924 (43 Stat. 360, 49 U. S. C. 151–6), the stock of which has at all times been wholly owned by defendant. At all times herein pertinent and material, the Mississippi Warrior Service was permitted by defendant to carry and did carry practically all classes of the more common

freight available for transportation on the Mississippi River at rates of 80 percent of the prevailing rail rates.

9. On March 2, 1921, plaintiff sent a letter to the Chief of Engineers as follows:

"I am asked by various river cities to quote a definite rate to them for transportation of commodities by means of the boats and barges being constructed under my government contract.

55 The different municipalities are in the process of installing terminal facilities and find that it is necessary to have definitely set forth by the Secretary of War what rates they may expect.

"I respectfully suggest that I be authorized to quote them the same rates as obtained on the Government Barge Line now operating on the lower river, viz—80% of the all-rail rates that now obtain.

"Will you be good enough, if you approve of my suggestion, to communicate with the Secretary of War, notifying him of same."

The "Government Barge Line" referred to in this letter was the Mississippi Warrior Service. On March 3, 1921, the Acting Chief of Engineers sent a letter to the Secretary of War which contains the following:

"It is represented by the lessee that it would be advantageous to the operation of the vessels if the rates of transportation should be fixed at 80 percent of the prevailing rail tariffs. These are the rates charged on the government line now operating below St. Louis, and in my opinion it would be in the interest of the shipping public to permit the same rates to be charged on this line. I accordingly recommend that the Secretary of War give his consent thereto."

On March 4, 1921, the Secretary of War gave his consent under the original contract to plaintiff's operation of the barges and towboats at rates less than the prevailing rail tariffs, i. e., 80 percent thereof. On or about March 10, 1921, plaintiff received from the office of the Chief of Engineers notification of such consent, and on or about March 14, 1921, he received from the District Engineer a copy of the letter of March 3, 1921, and the Secretary of War's endorsement thereon.

10. In the latter part of March 1922 plaintiff notified the Chief of Engineers that he was exercising his option to purchase the barges, towboats and unloading facilities, that he had appointed an appraiser for that purpose, and that he desired the Chief of Engineers to appoint another appraiser. The Chief of Engineers, April 1, 1922, refused to appoint another appraiser at that time on the ground that the terms of the lease had not yet begun to run.

11. On March 31, 1922. the Secretary of War sent a letter to plaintiff as follows:

"I am told there was recently an interview in the St. Louis Post-Dispatch in which you stated I had authorized you to
56 make rates on the lower Mississippi at eighty percent of the railroad rates. I have not seen the interview so I am not clear that what I have stated is definitely correct. But in any case, I told you at the time I could not authorize or approve any operation on the lower Mississippi that would enter into competition with the established line of barges. This line is operated for a definite purpose and should not be interfered with in that operation by any action of the Government.

"I said if there was freight on the lower Mississippi which could not be handled by the present operating line and it could be transported by your barges, in that case I would authorize a rate of eighty percent of the railroad rate. In making this statement I was assuming that what you told me—that the present line could not handle the material which you mentioned—is a fact; but any rate charged must be agreed to by General Downey and the operators of the present line.

"Your contract calls for a rate not less than the railroad rate without the approval of the Secretary of War and I shall give no approval which does not carry out this general statement."

The barge line referred to in this letter was the Mississippi Warrior Service. At the time when the letter was written, General Downey, referred to therein, was Chief of the Inland and Coastwise Waterways Service. The letter was released to the newspapers prior to the receipt thereof by plaintiff and was quoted in an article which appeared in the St. Louis Post-Dispatch on April 2, 1922, under a Washington date line bearing the date April 1.

12. On April 18, 1922, plaintiff had a meeting with the Secretary of War in Washington and at that time insisted that he had in writing been given the right to operate the barges and towboats at 80 percent of the full rail rates. The Secretary of War denied that plaintiff had a right to operate the barges and towboats at less than the full rail rates and stated that the delivery of the barges and towboats to plaintiff should be postponed until the Secretary of War had obtained legal advice with respect to plaintiff's rights.

13. Before the meeting with the Secretary of War on April 18, 1922, plaintiff went to the office of the Interstate Commerce Commission to arrange for filing certain barge line rates to be effective when the barges and towboats should be delivered to

him, and after the meeting with the Secretary of War an
57 official of the Interstate Commerce Commission informed plaintiff that he could not file his rates as long as the Secretary of War asserted the right to control plaintiff's rates.

14. On May 6, 1922, the Secretary of War sent a letter to plaintiff as follows:

"You are hereby notified that under the provisions of paragraph 2 (a) of the certain contract #E7076 between yourself and Major General William M. Black, Chief of Engineers, United States Army, dated May 28, 1919, as supplemented by an amendment thereto dated May 26, 1921, the consent and approval of the Secretary of War heretofore, on the 4th day of March 1921, given to the operation by you of the vessels covered by and included under the provisions of said contract, at transportation rates equal to 80% of the prevailing rail tariffs, is hereby withdrawn and cancelled as to any and all contracts, agreements or undertakings for transportation on the Mississippi River and its tributaries below the City of Saint Louis, Missouri, hereafter made and entered into by you.

"From and after this date you are authorized to operate said vessels on the Mississippi River and its tributaries below the said City of Saint Louis, only at transportation rates equal to and not less than the prevailing rail tariffs, save and except in such cases, and as to such transactions and commodities as the Secretary of War shall, upon application to him, have previously specifically consented to and approved."

On May 25, 1922, the Secretary of War sent a letter to plaintiff, the body of which is in part as follows:

"In compliance with the terms of my letter of May 6, 1922, you are hereby authorized to transport the following articles from port to port on the Mississippi River or its tributaries at not less than 80% of the all rail rates:

"'Liquids in bulk, including liquid asphalt or road oil, in drums; coal, lumber, sulphur, ties, cement, salt, sand, gravel, crushed rock; and grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.'

"Due to the conditions limiting the amount of grain which may be handled through New Orleans, and due to the limited elevator
58 capacity at Cairo and St. Louis, you will be required to obtain from Mr. Theodore Brent, Federal Manager, Mississippi-Warrior River Service, or his representative in St. Louis, Mr. J. P. Higgins, the amount of grain you may carry and specific dates upon which you can carry it."

15. On July 15, 1922, defendant delivered to plaintiff at St. Louis the 19 barges and 4 towboats.

The towboats delivered to the plaintiff were in all respects identical. Each was of the stern-paddle wheel type, equipped with a coal-burning steam engine rated at approximately 2,000 horsepower, was of 300-foot length over all, 58-foot beam and 10-foot depth of hold, and had a draft of approximately 4 feet with a light load of fuel and of approximately 5½ feet with a usual load of fuel.

The barges, when delivered to plaintiff, were in all respects identical and each was of steel construction with a spoon shaped bow especially designed for easy towing. Each of the barges was of 300-foot length, 48-foot beam, and 10-foot depth of hold, having a draft of approximately 19 inches when light, and a draft of 9 feet with a maximum load of 3,000 tons. Each of the barges had a double bottom and sides which, together with bulkheads, created 22 water- and oil-tight compartments between the outer and inner shells for carrying of all kinds of liquid cargoes, including crude oil and its derivative products; and each of the barges was completely equipped for loading and unloading liquid cargo by means of a 6-inch pipe system. Each of the barges also had an open cargo hold suitable for carrying materials or commodities not requiring protection from the weather. None of the barges was equipped to carry grain or other perishable commodities, but they could have been converted into barges capable of carrying such commodities by the construction of covers, roofs, or cargo boxes thereon. The barges were the most advanced in type of any river barge constructed and up to the present time are the only barges of this type on the Mississippi River.

16. Soon after the delivery of the fleet, it was discovered that the firing mechanism of the towboats was inefficient and plaintiff, in order to remedy this condition, installed oil-burning equipment on the towboat "Illinois." This change proved effective.

59 17. On August 7, 1922, immediately after the oil-burning equipment had been installed on the towboat "Illinois," plaintiff, with the approval of the District Engineer, caused this towboat and several of the barges to depart from St. Louis for Caseyville, Kentucky, situated on the Ohio River, to carry coal which had been offered to plaintiff for transportation from Caseyville, Kentucky, to the vicinity of St. Louis. The towboat "Illinois" and four of the barges returned to St. Louis on September 9, 1922. On the trip to and from Caseyville, the towboat "Illinois" carried a very light load of fuel, and the barges were empty on the way to Caseyville and loaded light to but a small fraction of their capacity on the return trip. The operation of the towboat and barges on the trip to and from Caseyville was interfered with by the very low water, groundings, and delays occasioned

by the necessity of waiting for dredges to clear crossing and dredging necessary beneath the coal tipple at Caseyville. During this trip mechanical breakdowns of the towboat "Illinois" occurred and general repairs and alterations were made on this towboat.

Experience on the trip to Caseyville and return indicated the necessity or desirability of making certain additions and changes on the towboat "Illinois" for its efficient operation and they were made between September 9, 1922, and September 26, 1922, by plaintiff's employees after the return of this towboat to St. Louis.

On September 26, 1922, plaintiff, with the approval of the District Engineer, caused the towboat "Illinois" and certain of the barges to depart for Hannibal, Missouri, to load a cargo of cement which the district office of the Corps of Engineers of the United States Army at Cincinnati, Ohio, wished to have transported to that point. The towboat "Illinois" and the barges experienced great difficulty on the trip to Hannibal by reason of extremely low water and the barges were loaded with cement at Hannibal to but a small fraction of their capacity. Nevertheless, the towboat and the barges experienced great difficulty by reason of low water on the trip from Hannibal to East St. Louis, Illinois. At the latter point plaintiff was advised that by reason of low water it would be impossible to navigate on the Ohio River,
60 and the Corps of Engineers at Cincinnati ordered plaintiff to unload the cargo of cement at East St. Louis for shipment by rail to Cincinnati. The towboat "Illinois" also experienced mechanical trouble on this trip, and repairs were made during the trip by plaintiff's employees. The towboat "Illinois" returned to the plaintiff's docks in St. Louis on October 14, 1922.

From October 14, 1922, until the end of November 1922, the towboat "Illinois" was tied up at plaintiff's docks in St. Louis with steam up and crew on board ready to tow any of the barges. While the towboat was so tied up further additions, changes, and repairs which were necessary or desirable for its efficient operation were made by plaintiff's employees.

Plaintiff did not operate the other three towboats during the period from July 15, 1922, to December 1, 1922.

18. About December 1, 1922, the plaintiff, with the approval and consent of the District Engineer, caused the barges and towboats to be placed in winter quarters where plaintiff expected to keep them until navigation could safely be resumed in 1923. For many years prior thereto it was customary at St. Louis to place commercial barges and towboats into winter quarters about December 1st and leave them there until sometime in March, in order to protect them from damage from ice and other winter elements. During this period it was unsafe to take such vessels out of winter quarters even though the river might be free of

ice because of the risk of injury due to sudden changes in the weather.

19. On December 13, 1922, Colonel Ashburn, Chief of the Inland and Coastwise Waterways Service, of which the Mississippi-Warrior Service was a section, sent a letter to plaintiff, as follows:

"On May 25, 1922, you were authorized to carry certain articles on the Mississippi River and its tributaries at not less than 80% of the all rail rates. Amongst them was 'grain over and above the capacity of the Mississippi-Warrior Service to handle such commodity.'

"The Secretary of War now authorizes you to carry any and all grain at not less than 80% of the all-rail rates that you can secure, regardless of the capacity of the Mississippi-Warrior Service to handle such commodity, and without any further action on your part being necessary. Please acknowledge the receipt of this letter.

61 "It is to be hoped that you will cooperate with the Mississippi-Warrior Service in your grain operations to such an extent that neither you nor they will be handicapped by the grouping of a number of barges at New Orleans loaded with grain which cannot be discharged promptly.

"A copy of this communication has been sent to the Grain Dealers Association of St. Louis, to Mr. Brent, and to the District Engineer Officer in St. Louis, for their information and guidance."

At the time when this letter was written, Colonel Ashburn and defendant knew that the barges and towboats were in winter quarters from which they could not then be removed without serious danger of injury, and that the barges were not then equipped to carry grain.

20. On January 5, 1923, the Secretary of War sent a memorandum to the Chief of Engineers as follows:

"1. I am returning the audit of the accounts of the Goltra Barge Line for the period July 15th–October 15, 1922, with memoranda from the Chief of Inland and Coastwise Waterways Service and from the Judge Advocate General attached thereto for your consideration.

"2. According to the view of the Judge Advocate General, we cannot annul the contract at this time with impunity. Suitable instructions should, therefore, be given the District Engineer at St. Louis that all future reports of operation will include the information necessary to clearly establish the right of the Government to take such action in the event of the failure of the lessee to carry out the terms of the contract.

"3. You will inform Mr. Goltra that it is the view of the War Department that the fleet should be operated to the maximum,

and failure to operate, if practicable, is a violation of the contract."

On January 16, 1923, the chief legal adviser to the Chief of Engineers submitted a memorandum to the Chief of Engineers, of which a paragraph reads as follows:

"If Mr. Goltra carried all of the freight offered him during the period, or up to the capacity of his barge line, then he has fully complied with the contract, and if he was ready at all times to carry freight of the kind contemplated by the contract which might be offered him, he would then be within the terms of his contract although none or very little might be offered, nor would the contract compel him to operate the fleet if the physical conditions on the river render it impracticable to do so."

62 On January 19, 1923, the Assistant Chief of Engineers forwarded to the District Engineer a draft of letter to be signed by the District Engineer and delivered to the plaintiff in accordance with the instructions of the Secretary of War. This letter was delivered to plaintiff by the District Engineer on January 29, 1923. The letter reads as follows:

"The Secretary of War has received a number of communications from commercial organizations interested in transportation on the Mississippi River complaining of the inactivity of the fleet of barges and towboats leased by you from the Government. He has also had under consideration my report of the audit of accounts of the operation of this fleet as made to October 15, 1922. This report, as you are aware, indicates a but limited movement of trade during the past season.

"The Secretary is not satisfied that the operation of the fleet has been as adequate and as vigorous as the last contract of May 28, 1919, contemplates and requires.

"The Secretary of War has therefore directed that you be informed that it is the view of the Department that during the period when navigation is practicable the fleet should be operated to the maximum and that failure to so operate it will be regarded as a violation of the contract."

21. Prior to the delivery to him of the letter dated January 19, 1923, plaintiff had, on January 15, 1923, sent a letter to the District Engineer requesting that certain dredging be done in the Mississippi River in front of the unloading facilities to enable barges to get into position for loading and unloading. The letter contained the following:

"We propose to begin operating the fleet as soon as the season opens, bringing in coal, ore, and other commodities, and I respectfully request that the dipper dredge which has been in this section and is now at work at Commerce, be detailed to do this

dredging, in order to put the channel in shape, as soon as it completes the work upon which it is engaged at present.

"While it will only take it a short time to do this work, nevertheless, February will soon be here and over, and we ought to be in position to start the fleet by the first of March, unless ice prevents."

22. While the towboats and barges were in winter quarters, plaintiff's employees were protecting the barges and towboats and were making alterations and repairs on some of them.

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23. No representative of defendant ordered plaintiff to take the barges and towboats out of winter quarters. While the towboats and barges were still in winter quarters, the Secretary of War on March 3, 1923, transmitted to Colonel Ashburn, the Chief of the Inland and Coastwise Waterways Service, a letter addressed to plaintiff, with written instructions for the delivery of the letter to plaintiff, the body of which letter is as follows:

"Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier and in other particulars.

"I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession of the said towboats and barges, and any unloading facilities erected pursuant to the supplemental contract and paid for by funds of the United States, to Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, who will deliver this notice and who is instructed and authorized to receive and receipt for the property herein mentioned."

On the same day when the letter and instructions were transmitted to Ashburn, which was a Saturday, plaintiff was in Washington and Ashburn delivered the letter to plaintiff in Washington during the afternoon of Sunday, March 4, 1923.

24. Prior to the delivery to plaintiff of the letter of March 3, 1923, from the Secretary of War, plaintiff had no notice or knowledge of any intention on the part of the Secretary of War to attempt to terminate the original contract or the supplemental contract, and the Chief of Engineers had not been consulted by the Secretary of War about terminating the contracts and did not

know of the action of the Secretary of War in sending the letter until some time after the delivery thereof.

64 25. On March 8, 1923, plaintiff sent a letter to the Secretary of War, the body of which is as follows:

"On Sunday, March 4, 1923, there was served upon me by Colonel T. Q. Ashburn, Chief, Inland and Coastwise Waterways Service, your letter of March 3, 1923, stating that in your judgment I had not complied with the terms and conditions of my contract with the Government dated May 28th, 1919, in that I had failed to operate the towboats and barges specified in said contract as a common carrier, and in other particulars; that therefore you declared said contract terminated and directed me to immediately deliver possession of said towboats and barges, and unloading facilities erected pursuant to a supplemental contract, to said Colonel T. Q. Ashburn.

"This notice was served upon me while I was in Washington on other business, and without any previous intimation that any step of this kind was contemplated, and I was informed by Colonel Ashburn that I must give an answer to this notice by six o'clock today.

"The abruptness of the action attempted to be taken, and the very brief opportunity allowed for any answer on my part, necessarily requires that my reply be brief.

"Most respectfully, I decline to comply with your demand. To do so would deprive me, without any notice whatever, or opportunity to be heard, of rights and property lawfully acquired at a very large expenditure by me of time and money. I have in face of most unjust interference and restrictions fully complied with all the terms of my contract, and further, I have complied with every demand or requirement made of me by either you or the Chief of Engineers of the United States, the lessor named in my contract.

"The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which as a citizen I am entitled, and which, in fairness and justice I now request."

Plaintiff never received any reply to this letter and was never granted the hearing requested in the letter.

26. Thereafter plaintiff caused the towboat "Illinois" to be prepared to resume operation and plaintiff caused it to have steam up and be ready to leave St. Louis for Caseyville, Kentucky, on Monday morning, March 26, 1923, in order to

65 tow some of the barges from the latter point with a cargo of coal which had there been offered for transportation.

65 27. On March 22, 1923, the Acting Secretary of War transmitted a memorandum to Ashburn, Chief of the Inland and Coastwise Waterways Service as follows:

"1. You are hereby designated as the representative of the United States for the purpose of taking possession of the towboats and barges leased by the United States to Edward F. Goltra under a contract dated May 28th, 1919.

"2. You will proceed to St. Louis, Missouri, Fayville, Illinois, and, if necessary, to Paducah, Kentucky, or elsewhere the said property may be found, and at once take possession of all of the said towboats and barges, or any number thereof that may be found.

"3. In taking such possession you are directed not to employ or use any action that will occasion strife, bodily force, or endanger the public peace.

"4. If physical resistance be offered to your taking such possession you are further directed to report that fact with all attending circumstances to me at once."

28. On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States.

29. The Chief of Engineers did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred.

30. The District Engineer at St. Louis did not know of the order of the Acting Secretary of War to Ashburn to seize the barges and towboats contained in the memorandum of March 22, 1923, or of the proposed seizure until after such seizure had occurred. On March 26, 1923, the District Engineer, learning about the seizure, pursued the seized vessels down the Mississippi River because he deemed himself officially responsible for
66 the vessels, but upon being shown a letter from the Acting Secretary of War directing Ashburn to seize the barges and towboats he returned to St. Louis.

31. Prior to the seizure of the barges and towboats on March 25, 1923, the Chief of Engineers had not arrived at any judgment or conclusion or rendered any report to any one to the effect that plaintiff had in any manner failed to perform any of his obligations under the contract.

32. Commercial operation of barges and towboats of the same general type as plaintiff's in or out of St. Louis did not commence in the year 1923 prior to the seizure of the barges and towboats by Ashburn, and the Mississippi-Warrior Service did not operate any commercial tow in or out of St. Louis in the year 1923 prior to the seizure.

33. At the time of their seizure the barges and towboats were in good condition and repair and contained all of the alterations and repairs which plaintiff had placed thereon since delivery to him by defendants on July 15, 1922.

34. At all times from the delivery of the barges and towboats to plaintiff on July 15, 1922, until the seizure thereof on March 25, 1923, plaintiff, in connection with his operation and maintenance of the barges and towboats as a common carrier, maintained barge line docks with railroad connection and unloading facilities in St. Louis, offices in St. Louis equipped with telephone service, signs indicating to the public the location of the docks and offices of the Goltra barge line, and stationery indicating the offices of the Goltra barge line, and maintained a staff of employees to perform all services in connection with the operation and maintenance of the barges and towboats.

Plaintiff also held himself out as a common carrier by means of the barges and towboats between points on the Mississippi River and its tributaries of all cargo suitable for transportation by means of barges and towboats, which might be offered to him by anyone and was ready, willing, and able to transport such cargo. During this time plaintiff solicited business and endeavored to get cargo for transportation, and it was well known in the Mississippi Valley that he had the barges and towboats and was seeking business therefor.

35. During the late summer and fall of 1922, and winter of 1922–23, the water in the Mississippi River and its tributaries was lower than it had even been in recorded history.

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During that period the low water and peculiar channel conditions caused the grounding of many barges and towboats, including those operated by the Mississippi-Warrior Service.

Barges and towboats could only be operated on the Mississippi River above St. Louis and below St. Louis to Cairo and on the Ohio River under great difficulties due to low water, which resulted in groundings, delay, and damage, even with light and unprofitable loads.

There was no possible cargo offered to plaintiff except that hauled by him and referred to in finding 17. From July 15, 1922, to March 25, 1923, plaintiff, as a common carrier, transported by means of the barges and towboats all the cargo offered that the barges were equipped to carry.

36. After Ashburn had seized the barges and towboats, a suit was commenced on plaintiff's behalf in the District Court of the United States for the Eastern District of Missouri against the Secretary of War, Ashburn, and the United States District Attorney at St. Louis, and a bill of complaint was filed therein. In the bill of complaint, plaintiff prayed, among other things, for temporary and permanent injunctive relief looking toward the restoration to him of the towboats and barges and the unloading facilities, and restraining defendants from interfering with plaintiff's possession thereof and an adjudication of plaintiff's rights under the original and supplemental contracts. On the same day, plaintiff was granted a temporary restraining order requiring defendants to restore to plaintiff possession of all of the towboats and barges which had been seized, and requiring defendants to show cause why temporary injunction should not issue.

37. The temporary restraining order and order to show cause, together with the bill of complaint, was served upon Ashburn as he was proceeding south on the Mississippi River with the towboats and barges which he had seized. Ashburn made a motion to quash said service, which motion was denied and Ashburn was ordered to return the towboats and barges to the jurisdiction of the court at the Port of St. Louis, Missouri. Thereafter, the towboats and barges remained in the custody of defendant until September 1924.

68 38. On or about April 27, 1923, General Lansing H. Beach, Chief of Engineers, signed a letter, which reads as follows:

"WAR DEPARTMENT,
"OFFICE OF THE CHIEF OF ENGINEERS,
"*Washington, April 27, 1923.*

"E. F. GOLTRA, Esq.,
"*La Salle Building, St. Louis, Missouri.*

"SIR: Pursuant to the right reserved in paragraph eight of the contract dated May 28, 1919, and the supplement thereto dated May 26, 1921, between you and the United States, for the operation as a common carrier of a fleet of four towboats and nineteen barges, and the erection of unloading facilities, you are hereby notified that in my judgment you have not complied with the terms and conditions of said contract in that you have failed to operate the said towboats and barges as a common carrier.

"I, therefore, declare the said contract and the supplement thereto terminated. You are hereby directed upon the receipt of this notice immediately to deliver possession to the United States of the said towboats and barges, and any unloading facili-

ties erected pursuant to the supplemental contract and paid for by funds of the United States.

"Very truly yours,

"(Signed) LANSING H. BEACH,
"Lansing H. Beach,
"*Major General, Chief of Engineers.*"

This letter was signed by General Beach at the direction of the Secretary of War and did not represent the judgment of the Chief of Engineers.

39. On September 4, 1924, after a hearing, Honorable C. B. Faris, United States District Judge, made an order granting temporary injunction which required the defendant forthwith to restore to plaintiff at the Port of St. Louis all of the barges, towboats, and other facilities and appliances seized by defendants, subject to an accounting for damages resulting from the use and possession of the property since the seizure thereof and restraining those defendants from taking any of the property from plaintiff's possession until further order of the court.

40. The order granting the temporary injunction was reversed on appeal on July 23, 1925, by the United States Circuit
69 Court of Appeals for the 8th Circuit in a decision reported in 7 F. (2d) 338, and on June 7, 1926, on writ of certiorari, the Supreme Court of the United States, in a decision reported in 271 U. S. 536, affirmed the decision of the Circuit Court of Appeals. Thereupon, between June 23, 1926, and August 1926, pursuant to and acting upon the mandate of the Supreme Court, defendant resumed the possession of the towboats, barges, and unloading facilities which had been acquired by defendant on March 25, 1923, but had been interrupted by the temporary injunction of September 4, 1924. Defendant has retained possession of the boats and barges since August 1926, and has caused the same to be operated as a part of the Mississippi Warrior Service.

41. On November 7, 1927, the Judge of the District Court for the Eastern District of Missouri, finally disposed of plaintiff's litigation with the Secretary of War and Ashburn, by granting a motion to dismiss an amended and supplemental bill of complaint. On November 2, 1928, the determination of the District Court was affirmed by the United States Circuit Court of Appeals for the 8th Circuit in a decision reported in 29 F. (2d) 257, and on March 11, 1929, the Supreme Court of the United States, in a decision reported in 279 U. S. 843, denied a petition for writ of certiorari.

42. On or about December 6, 1924, plaintiff again undertook to exercise his option to purchase the fleet, and for that purpose

appointed an appraiser, so notifying the Chief of Engineers and requesting him likewise to appoint an appraiser. The Chief of Engineers refused the request, assigning as his reason therefor the seizure of the towboats and barges and the then pending litigation.

42. For the purchase and installation of the oil burning equipment upon the towboat "Illinois" referred to in finding 16, plaintiff spent the amount of $6,414.28, which was a reasonable expense therefor, and for which sum plaintiff has never been reimbursed.

44. For desirable or necessary repairs to and replacement of defective feed pumps on the towboat "Illinois," plaintiff spent the amount of $1,027.23, and for other desirable or necessary additions, changes, and repairs on the towboat "Illinois,"
70 plaintiff spent the amount of $732.11. These expenditures were reasonable and plaintiff has never been reimbursed therefor.

45. For installation of powdered coal burning equipment on the towboat "Minnesota," which installation was desirable, plaintiff spent the amount of $7,140.89, which was a reasonable expense therefor and for which sum plaintiff has never been reimbursed.

46. At the time of the seizure of the barges and towboats on March 25, 1923, there were on the towboat "Illinois," fuel oil and other supplies belonging to plaintiff for which plaintiff had paid, and the reasonable value of which was $5,038.44. No part of the supplies was returned to plaintiff, and he has never been reimbursed therefor.

47. When the barges and towboats were returned to plaintiff in September 1924, under the order of the United States District Court, they were damaged and in need of many repairs other than ordinary current repairs, and many parts were missing from some of the towboats. None of these conditions existed when the barges and towboats were seized. By reason of these conditions, plaintiff spent for repairs and replacements the amount of $79,474.52, which was a reasonable expense therefor and for which sum he has never been reimbursed.

48. For insurance which plaintiff was required by Section 2 (b) of the original contract to procure, he spent the amount of $21,017.73 for the period from July 15, 1922, to March 25, 1923, and the amount of $30,830.30 for the period from September 1924 to July 1926, which amounts were a reasonable expense for insurance and for which plaintiff has never been reimbursed.

49. During both periods that plaintiff was in possession of the towboats and barges he operated at a loss.

50. Pursuant to the supplemental contract, plaintiff provided, in the year 1921, at his own expense, the tract of land (hereinafter referred to as the land provided by plaintiff), and concrete

runways located on part thereof, on which the unloading facilities referred to in the supplemental contract were to be erected and were to stand and operate; the remainder of the concrete runways was located on the land of the Mississippi Valley Iron Company by permission of that company procured by
71 plaintiff, and with the consent of the District Engineer to such arrangement. The land provided by plaintiff was accreted and was located in the City of St. Louis and extended from the Mississippi River on the east to the right-of-way of the St. Louis & Iron Mountain Railroad Company (Missouri Pacific) on the west, and was directly east of the 6500 South Broadway Block in the City of St. Louis. Plaintiff caused the runways to be built at his own expense according to plans submitted by plaintiff to and approved by the District Engineer. Defendant caused the unloading facilities referred to in the supplemental contract to be erected on the concrete runways. The unloading facilities consisted of a steel travelling crane which moved along the runways. The travelling crane was a substantial structure, of great height and length and was so equipped that the bucket of the crane, having a 10-ton capacity, could be lowered over the water into the holds of barges tied to the bank of the Mississippi River alongside said tract of land, and remove cargo from the barges and deposit the same in railroad cars or other means of transportation.

The construction of the concrete runways cost plaintiff the amount of $36,061.49, which was a reasonable cost therefor and for which plaintiff has never been reimbursed.

51. For the entire periods that plaintiff was in possession of the fleet the reasonable rental value of the land provided by him for runways and loading facilities was $6,000.00.

52. On February 13, 1930, plaintiff sent a letter to the Secretary of War as follows:

"In connection with my claim against the United States and/or the Inland Waterways Corporation, arising out of the occupation of real estate owned by me in South St. Louis, Missouri, by unloading facilities erected thereon by the United States Government under the provisions of the supplemental contract between the Chief of Engineers and myself, dated May 26, 1921, I beg to advise that if the United States and/or the Inland Waterways Corporation will immediately release and convey to me the said unloading apparatus and will immediately vacate and deliver to me possession of my property upon which said apparatus is located, I will release the Government from any and all claims accruing to me account of the aforesaid supplemental contract, save only my claims for use of my property, the
72 expense of the caretakers (Watchmen), and accrued interest

on these said claims, all up to the date of the aforesaid conveyance and notice of release to me of my property."

Defendant refused to take further action upon these claims in connection with the unloading facilities and the land provided by plaintiff because of the pendency of litigation between plaintiff and Inland Waterways Corporation involving the supplemental contract. On August 13, 1930, the Acting Secretary of War sent a letter to plaintiff, the body of which is as follows:

"Referring to the conversations and correspondence heretofore had relative to an unloading apparatus erected upon lands owned by you at St. Louis, Missouri, under the provisions of a supplemental contract dated May 26, 1921, and subsequently terminated, you are advised that the United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and waives whatever right, title, or interest it may be thought to have in the same."

On August 21, 1930, the plaintiff sent a letter to the Chief of Engineers, as follows:

"Herewith copy of a communication received by me from Acting Secretary of War F. H. Payne.

"Will you kindly advise me whether or not I am to understand that you, in your capacity as one of the parties to the supplemental contract referred to in Mr. Payne's herewith attached communication, concur in same and do now notify me you have no further use for my property and your leasing privilege under same is now by your free act positively terminated."

On August 28, 1930, the Chief of Engineers sent a letter to plaintiff, the body of which is as follows:

"1. Reference is made to your letter of the 21st instant regarding the unloading apparatus erected on your property at St. Louis, Mo., pursuant to a certain supplemental contract dated May 26, 1921.

"2. In reply you are advised that the Chief of Engineers concurs in the letter addressed to you under date of August 13, 1930, in which you were advised that the 'United States claims no right, title, or interest whatsoever in the said unloading apparatus, or in the real estate upon which it is situated, and
73 waives whatever right, title, or interest it may be thought to have in the same.'"

53. At all times the salvage value of the concrete runways was less than the cost of removing them.

Counterclaims

54. In September 1925, the defendant sold and delivered to the plaintiff 3,568.8 barrels of fuel oil, the reasonable value of which was $1.35 per barrel, or a total of $4,817.88, for which the plaintiff

has not paid anything to the defendant. No demand for payment of this sum was made before the filing by the defendant of its first counterclaim in this cause.

55. On or about June 15, 1928, the plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, his income tax return for the year 1927, showing a net loss for the year and no tax due, whereas in fact the plaintiff had a net income for said year subject to income tax, amounting to $38,696.70, and the tax thereon amounted to the sum of $1,697.92, which the plaintiff failed to pay and for which he is indebted to the defendant with interest thereon. On or about December 7, 1931, plaintiff executed and filed with the Commissioner of Internal Revenue a consent that an assessment of income tax due from the plaintiff for the year 1927 might be made by said Commissioner on or before December 31, 1932, except that if a notice of deficiency in tax was sent to the taxpayer on or before that date, the time for making assessments should be extended beyond that date by the number of days during which the Commissioner was prohibited from making an additional assessment, and for sixty days thereafter.

On or about December 29, 1932, a notice of deficiency for the year 1927 in the amount of $1,697.92 was mailed by the Commissioner of Internal Revenue to the plaintiff. On or about March 18, 1933, within the time extended by the said consent of December 7, 1931, the Commissioner of Internal Revenue assessed as the tax of the plaintiff for the year 1927 the sum of $1,697.92, together with interest thereon in amount of $510.21, aggregating the sum of $2,208.13. Notice of the assessment was given to the plaintiff, and demand for payment was made by the Col-
74 lector of Internal Revenue on or about March 22, 1933; and on April 11, 1933, the Collector granted an extension of time for the payment of this amount to March 1, 1934. Said amount has not been paid by the plaintiff.

On March 14, 1930, plaintiff filed with the Collector of Internal Revenue of St. Louis, Missouri, a tentative income tax return for the year 1929, disclosing no net income and no tax due, whereas, in fact, for the year 1929 the plaintiff had a net income subject to income tax in the sum of $22,954.25, and the tax thereon amounted to the sum of $377.26. The time for filing the return for the year 1929 was extended by the Collector to April 15, 1930, but plaintiff has filed no further return for that year.

On or about February 7, 1932, the Commissioner of Internal Revenue mailed to plaintiff a notice of the tax determination for the year 1929. On or about April 27, 1934, the Commissioner of Internal Revenue assessed the tax against plaintiff for the year 1929 in the amount of $377.26, together with a penalty of $94.32 for failure to file a return as required by law, and interest on said

tax of $93.17. Notice of said assessment was given and demand for payment was made by the Collector of Internal Revenue on April 30, 1934, but said amount has not been paid by the plaintiff.

For the year 1930 plaintiff filed no income tax return, whereas, in fact, he had a net income subject to income surtax in the sum of $11,631.49, and the tax thereon amounted to the sum of $16.31, of which the sum of $8.00 had been paid at the source, leaving a balance of $8.31 due and owing. On February 7, 1934, the Commissioner of Internal Revenue mailed to the plaintiff a notice of the tax determination for the year 1930. On or about April 27, 1934, the Commissioner of Internal Revenue assessed a tax for the year 1930 in amount of $8.31, together with a penalty of $2.08 for failing to file a return and interest on the tax of $1.55. Notice of assessment was given and demand for payment thereof was made by the Collector of Internal Revenue on or about April 30, 1934, but said amount has not been paid by the plaintiff.

The total of the above taxes with interest and penalties is $2,784.82.

75 56. The counterclaims being valid are allowable.

Taking the amount of the counterclaims and all the relevant facts and circumstances, including the expenses of plaintiff, into consideration, the value for the lease, option to purchase, and all legal and equitable claims as of March 25, 1923, is $350,000.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the defendant is entitled to recover on the counterclaims and the plaintiffs are entitled to recover, after deduction of the counterclaims, the sum of $350,000.00, with interest at six percent per annum from March 25, 1923, to the date of payment, not as interest but as a part of just compensation.

It is therefore ordered and adjudged that plaintiffs recover of and from the United States the sum of three hundred fifty thousand dollars ($350,000) with interest at six percent per annum, from March 25, 1923, to the date of payment.

Opinion

Whaley, Chief Justice, delivered the opinion of the court:

Before this suit was argued and submitted to the court, Edward F. Goltra departed this life on April 2, 1939, and his qualified executors were substituted as plaintiffs. Wherever the word "plaintiff" is used in this opinion, reference is made to Edward F. Goltra and not to the substituted plaintiffs.

This case was brought to the court under a special jurisdictional act, 48 Stat. 1322, which reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the Untited States under orders of the Acting Secretary
76 of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith: * * *"

It will be seen that this act not only waives the statute of limitations but orders the court to hear, consider, and render judgment notwithstanding any previous court decisions and to give just compensation for the claims of plaintiff for the taking of certain vessels and unloading apparatus under orders of the Acting Secretary of War, whether the taking was tortious or not, and for any other legal or equitable claims arising out of the transactions.

When this bill was before the Committees of Congress, the Committees gave full consideration to the decision of the Supreme Court in the case of Goltra v. Weeks, 271 U. S. 536. This case involved an injunction and the Committees were aware that the merits of the case had never been considered by the court. The Committees also had before them a letter from the Attorney General urging the passage of the bill so that the plaintiff could have his day in court on the merits of the case. The real question involved was whether the cancellation of plaintiff's two contracts by the Secretary of War on March 3, 1923, followed by the seizure of the fleet on March 25, 1923, under orders of the Acting Secretary of War, was within the terms of the contracts between the plaintiff and the defendant. The Court held that the "lessor" mentioned in the contract meant the Chief of Engineers and not the Secretary of War.

On May 28, 1919, plaintiff entered into a contract with William M. Black, Major General, Chief of Engineers, U. S. Army, whereby the barges and towboats still under construction were leased to the plaintiff for a term of five years after delivery of the first unit, with an option to plaintiff to purchase the fleet and pay therefor in instalments over a period of fifteen years from the exercise of the option; the rental consisted of all net earnings made by the fleet and was to be credited on account of

the purchase price of the fleet. As part of the transaction plaintiff released the United States from all claims which he had against them as a result of certain engagements made for World War purposes.

On May 26, 1921, a supplemental agreement was entered into between the parties by which the plaintiff agreed to furnish, subject to the defendant's approval, a certain tract of
77 land and runway on which unloading facilities furnished by the lessor were to be erected. The unloading facilities were furnished by the lessor and erected on the land after the runways had been provided by the plaintiff.

On July 15, 1922, the defendant delivered the 19 barges and 4 towboats.

From the time of the delivery of the barges and towboats to the plaintiff, they were operated by the plaintiff as a common carrier until December 1, 1922, when they were placed in winter quarters with the approval and consent of the District Engineer, acting for and as the representative of the Chief of Engineers. It was understood that the fleet was to remain in winter quarters until navigation could be safely resumed in the spring of 1923. During the time that plaintiff had possession of the fleet it was operated to the best advantage by him and plaintiff, as a common carrier, transported all the cargo offered that the barges were equipped to carry. There was no complaint or protest by the lessor of the operation of the fleet or the failure to accept cargo by the defendant.

On March 3, 1923, the Secretary of War transmitted to Colonel Ashburn, who was one of the officials of the Mississippi Warrier Service, which was a fleet of barges and towboats owned by the Government and operated on the Mississippi River, a letter addressed to plaintiff in which the Secretary of War stated that, pursuant to the right under paragraph eight of the original contract and the supplemental contract, in his judgment, the plaintiff had not operated the barges and towboats under the terms and conditions of the contract and had failed to operate them as a common carrier and declared the contract and the supplemental contract to be terminated. He requested the plaintiff to deliver the fleet and the unloading facilities to Colonel Ashburn. This letter was delivered by Colonel Ashburn to the plaintiff in Washington, D. C., during the afternoon of Sunday, March 4, 1923.

On March 8, 1923, plaintiff declined to comply with the demands of the Secretary of War complaining of the unjust interferences and restrictions which had been interposed and asserted that he had complied with every demand and requirement of

the Chief of Engineers who was the lessor named in the contract.

78 On March 22, 1923, the Acting Secretary of War authorized Colonel Ashburn, as a representative of the United States, to take possession at once of all of the barges and towboats or any number that could be found. Colonel Ashburn, acting upon the above order, went to St. Louis on March 25, 1923, and while plaintiff was absent took the fleet from the possession of the fleet's employees without their consent for the use and benefit of the United States. The nature of the seizure is best described by the United States District Engineer who wired the Chief of Engineers as follows:

"Col. Ashburn with the Federal Barge Line towboat Vicksburg and about forty men arrived at Goltra fleet yesterday Sunday morning about eleven overawed Goltra's men and towed four boats and one barge down river about six miles Stop Vicksburg left them on Illinois side, came back to St. Louis, placed four Goltra barges at Barge Line Terminal and went down river with all other Goltra barges wintered at this city * * *."

After the seizure a suit was commenced in plaintiff's behalf in the District Court of the United States against the Secretary of War, Colonel Ashburn, and the United States District Attorney. A temporary order was obtained and the barges were returned to the jurisdiction of the court and brought to St. Louis but they remained in the custody of the defendant until September 4, 1924.

After the hearing on the application for the injunction, the District Judge granted plaintiff's request and ordered the barges returned to him. At this trial a letter from the Chief of Engineers cancelling the contract was presented for the consideration of the court on behalf of the defendant. This letter is dated April 27, 1923, several months after the cancellation of the contract by the Secretary of War and more than a month after the seizure of the fleet by the acting Secretary of War.

The case was appealed to the Circuit Court which reversed the District Judge and the case was then taken to the Supreme Court of the United States.

On June 7, 1926, the Supreme Court affirmed the decision of the Circuit Court and the fleet was delivered to the defendant during June and September of that year. In its decision the Supreme Court held (271 U. S. 536, 548, 550):

79 "Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. Of course the Chief Engineer is not the real party in interest. He is a professional expert, as such

was designated as lessor, and is really acting only as an agent for the Government. * * *

"* * * The right of the lessor to take over the fleet under § 8 of the contract, unless there was fraud in the judgment of termination by the Chief of Engineers, the lessor, of which we have found no evidence, is clear. We think, therefore, the injunction should be dissolved and the fleet restored to the lessor."

It will be seen that the decision of the Supreme Court was based on the assumption that the Chief of Engineers had exercised his judgment in a fair and impartial way and terminated the contract.

In the trial of the i[illegible] case it is shown that the Chief of Engineers did not exer[illegible]is own judgment but was coerced, after the Acting Secretary of War had seized the fleet, in signing the order cancelling the contract.

The evidence is clear and convincing that the Chief of Engineers believed the plaintiff had performed his part of the contract and that there was no cause or reason which would justify him in cancelling the contract. He testified that he did not exercise his own judgment but that, when the letter was presented to him for his signature, he was forced to sign.

It is apparent from the record that the Chief of Engineers did not exercise his judgment in cancelling the lease before the cancellation of the contract by the Secretary of War and the subsequent seizure of the fleet by the Acting Secretary of War.

The cases are too numerous for citation that the plaintiff was entitled to an uninfluenced decision by the Chief of Engineers and that he alone could act.

The Secretary of War had no authority under the contract to exercise the right conferred upon the Chief of Engineers and, until the Chief of Engineers had cancelled the contract, the action of the Secretary of War, in cancelling the contract, was ultra vires, and the action of the Acting Secretary of War in ordering the seizure of the fleet by Colonel Ashburn was a tortious act. Burton Coal Co. v. United States, 60 C.
80 cls. 294, affirmed 273 U. S. 337; Williams Eng. & Cont. Co. v. United States, 55 C. Cls. 349; Michael H. King v. United States, 37 C. Cls. 428; Sun Shipbuilding Co. v. United States, 76 C. Cls. 154; Helvetia Milk Condensing Co. v. United States, 74 C. Cls. 142 and Lutz Co. v. United States, 76 C. Cls. 405.

The plaintiff having been deprived of his lease and option to purchase, illegally and wrongfully, the question arises as to what compensation he shall receive.

Plaintiff only had a contract for a lease of the fleet for five years with an option to purchase. He attempted to exercise the option to purchase but the defendant refused to comply with the

provision of the contract with reference to the appointment of arbitrators to fix the value which should be paid.

During the operation of the fleet from July 1922, to December 1, 1922, the plaintiff sustained a loss. This was a new service and large expenditures had to be made for prospective business, for providing land and runways, for costs incurred for advertising the service, insurance, and for repairs and changes in the towboats. Plaintiff was prohibited from charging less than the rail rate. The loss can be well understood.

It is contended by the plaintiff that, in arriving at just compensation, an offer to rent the fleet made years after the fleet had been seized and the rental value of similar vessels on the Mississippi River should be taken into consideration. These contentions cannot be sustained. Sharp v. United States, 191 U. S. 341, 348, 349; Clarke v. Hot Springs Electric Light & Power Co., 55 Fed. (2d) 612; and Sommers v. Commissioner of Internal Revenue, 63 Fed. (2d) 551.

There were no other towboats and barges on the Mississippi River at that time which could have been rented. There was no market value for the lease and option to purchase. Reproduction less depreciation or cost less depreciation are not fair bases on which to place valuation. Plaintiff is entitled to have taken into consideration what he spent in inaugurating the service and the cost of repairs and changes made to the towboats and the supplies furnished by him. Prospective profits can not be considered. No profits were made by the plaintiff during
81 the time he had possession of the fleet from September 1924, to July 1926. This was primarily due to the fact that all shippers on the Mississippi River realized that the fleet was tied up in litigation and possession was being sought through the courts by the defendant.

As was said by Justice Butler in Standard Oil Co. v. So. Pacific Co., 268 U. S. 146, 156:

"It is to be borne in mind that value is the thing to be found and that neither cost of reproduction new, nor that less depreciation, is the measure or sole guide. The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

As the plaintiff only possessed a lease with an option to purchase and there being no market value, it is necessary for the Court in arriving at an amount sufficient to compensate him for injuries sustained, to take into consideration all outlays made by him including the rental value of his land, and make reasonable deduction for the less time engaged and for release from

care, trouble, risk, and responsibility attending a full execution of the contract. United States v. Speed, 75 U. S. 77.

In Hetzel v. Baltimore & Ohio Railroad Co., 169 U. S. 26, 37, 38, 39, the court said:

"* * * in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done."

The court quoted with approval from Baker v. Drake, 53 N. Y. 211, 220, as follows:

"The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does not come with very good grace from the defendant to insist upon the most specific and certain proof as to the cause and the amount of the damage when he has himself been guilty of a most inex-
82 cusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about."

In Hoffer Oil Corporation v. Carpenter, 34 Fed. (2d) 589, 592, the court said:

"A person who has violated his contract will not be permitted to reap advantage from his own wrong, by insisting upon proof which, by reason of his breach, cannot be furnished. * * *

"A party, who has broken his contract, will not be permitted to escape liability because of the lack of a perfect measure of the damages caused by his breach. * * *

"A reasonable basis for computation, and the best evidence which is obtainable under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient."

See Eastman Kodak Co. of New York v. Southern Photo Materials Company, 273 U. S. 359.

Taking all the relevant facts into consideration and after allowing the counterclaims, in making a jury award, the Court concludes that the sum of $350,000.00 is just compensation for the vessels and unloading apparatus and all other claims, legal or equitable, arising out of the transactions.

Judgment is entered for the plaintiffs in the sum of $350,000.00, with interest at six percent per annum, not as interest but as a part of just compensation, from March 25, 1923, to the date of

payment. Virginia Engineering Company v. United States, 89 C. Cls. 457.

It is so ordered.

LITTLETON, Judge; and GREEN, Judge, concur.

WHITAKER, Judge; and WILLIAMS, Judge, took no part in the decision of this case.

83 X. *Judgment*

At a Court of Claims held in the City of Washington on the first day of April, A. D., 1940, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decided, as a conclusion of law, that the defendant is entitled to recover on the counter-claims and the plaintiffs are entitled to recover, after deduction of the counter-claims.

It is therefore ordered and adjudged that the plaintiffs recover of and from the United States the sum of three hundred fifty thousand dollars ($350,000) with interest at six percent per annum, from March 25, 1923, to the date of payment.

84 XI. *Petition for appeal to the Supreme Court of the United States*

Filed June 19, 1940

Comes now the United States, defendant herein, and states that on the first day of April 1940, this Court entered judgment against it in the sum of $350,000, together with interest thereon at the rate of 6 per cent per annum from March 25, 1923, to the date of payment.

The United States, believing that the judgment of this Court is incorrect, prays that it may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this Court, and that a transcript of the record of this cause, duly authenticated, may be sent to the Supreme Court of the United States.

The United States submits and present to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

FRANCIS BIDDLE,
Solicitor General.

85 XII. *Assignment of errors*

Filed June 19, 1940

Comes now the United States by Francis Biddle, its Solicitor General, and avers that the Court of Claims has erred.

1. In holding that the Act of April 18, 1934, conferring jurisdiction upon it to entertain, hear, and render judgment on the claims of Goltra against the United States for just compensation for certain property taken, authorized it to award interest from the date of the alleged taking.

2. In holding that the use of the words "just compensation" in the act called for the assessment of the same measure of damage as would apply to a taking of property by eminent domain.

3. In holding that the act, in the absence of specific language expressly directing it so to do, authorized it to award interest.

86 4. In failing to hold that Section 177 of the Judicial Code precluded it from allowing interest on any claim against the United States prior to the time of the rendition of judgment.

5. In including in its judgment interest on the claim.

This 19th day of June 1940.

FRANCIS BIDDLE,
Solicitor General.

128 XIV. *Order allowing appeal to the Supreme Court of the United States*

Filed June 19, 1940

This cause having come before this Court on this 19th day of June 1940, upon the petition of the United States, the defendant herein, praying for leave to appeal to the Supreme Court of the United States for reversal of the judgment herein and that a duly certified copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered this motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court—

Ordered and adjudged that the United States, defendant herein, be and it is hereby allowed an appeal from the order
129 and judgment of this Court, and that a duly certified copy of the record be transmitted to the Clerk of the Supreme Court of the United States. It is further—

Ordered that the United States be and it is hereby permitted a period of 40 days from the date hereof within which to file and docket this appeal to the Supreme Court of the United States.

This 19th day of June 1940.

RICHARD S. WHALEY,
Chief Justice of the Court of Claims of the United States.

131 [Citation in usual form showing service on Herman J. Galloway, filed June 19, 1940, omitted in printing.]

133 XVII. *Request for transcript of record*

Filed June 19, 1940

TO THE CLERK OF THE COURT OF CLAIMS.

SIR: You are hereby requested to prepare a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above-entitled cause, and to including in such transcript of record the following:

Pleadings, argument, and submission of the case, special findings of fact found by the court, conclusion of law, opinion of the court, order of the court entering judgment, and all papers filed with the court in the above-entitled cause since the entry of judgment.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

134 XVIII. *Petition for cross-appeal*

Filed June 24, 1940

To the Honorable Chief Justice and Judges of the Court of Claims:

Come now the plaintiffs herein and respectfully show that the United States, the defendant herein, has heretofore filed a petition for the allowance of an appeal from the judgment of this Court made and entered herein on the 1st day of April 1940 and that said petition was allowed on the 19th day of June 1940; and the plaintiffs also considering themselves aggrieved by said judgment insofar as it limits the amount of recovery here by way of just compensation to the sum of $350,000, with interest at six percent per annum, not as interest but as part of just
135 compensation, from March 25, 1923, to the date of payment pray for the allowance of a cross-appeal to the Supreme Court of the United States from that part of said judgment for the reasons stated in the assignment of errors filed herewith.

Plaintiffs further pray that a transcript of the record of this cause, as indicated in the accompanying praecipe, duly authenticated, may be sent to the Supreme Court of the United States.

Dated June 24, 1940.

DWIGHT, HARRIS, KOEGEL & CASKEY,
Dwight, Harris, Koegel & Caskey,
Attorneys for Plaintiffs.

HERMAN J. GALLOWAY,
Of Counsel.

136 XIX. *Assignment of errors*

Filed June 24, 1040

Come now, Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased, Plaintiffs herein, and file the following assignment of errors upon which they will rely in the prosecution of the cross-appeal for the allowance of which petition is herewith filed:

I. The Court erred in failing to make the following special findings of fact requested by plaintiffs each of which was made by the Commissioner of this Court assigned to hear this cause:

A. The requested special finding of fact embodied in the Commissioner's finding 59, which is as follows:

"The average cost of the towboats was $375,000 each. The average cost of the barges was $110,000 each.

137 "The value of the towboats and the barges from the year 1922 and thereafter until the end of the year 1924 was approximately the same as the original cost thereof."

B. The requested special finding of fact embodied in the Commissioner's finding 60, which is as follows:

"The reasonable market rental value on the Mississippi River and its tributaries of the towboats from March 1922 to the present time was 1/15th of one percent per day of the cost of each towboat, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of the towboats to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $2,000 per year per towboat.

"The reasonable market rental value on the Mississippi River and its tributaries of the barges from March 1922 to the present time was 1/10th of one percent per day of the cost of each barge, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, main-

tenance, repairs necessary for operation and a return of said barges to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $500 per year per barge."

C. The requested special finding of fact embodied in the Commissioner's finding 61, which is as follows:

"In May 1925, C. J. Fiero, vice president and general manager of Standard Oil Company of Louisiana, and E. F. Wieck, superintendent of lighterage of that company, desired to acquire for that company the use of the barges and towboats for the transportation of crude oil from its pipe line terminal at Grand Lake, Arkansas, down the Mississippi River to its refinery at Baton Rouge, Louisiana, and for the transportation of refined oils up the river from Baton Rouge on the return trips, and for this purpose made an offer in behalf of Standard Oil Company of Louisiana to lease from plaintiff the nineteen barges and
138 four towboats upon the following terms: Standard Oil Company of Louisiana was to furnish all of the crew, food, fuel, and other supplies and to assume all risks and costs of insurance, maintenance, repairs, and all other costs of operation, and was to pay to plaintiff rental at the rate of $\frac{1}{15}$th of one percent per day on the cost of said towboats, assumed to be $400,000 each, and $\frac{1}{10}$th of one percent per day on the cost of said barges, assumed to be $110,000 each, for a period of five years with the option to Standard Oil Company of Louisiana to continue to lease upon such terms for an additional period of five years. Plaintiff was willing and desired to accept the offer, but on account of the then pending litigation over his right to continue in possession of the barges and towboats, he was unable to do so as he could not assure Standard Oil Company of Louisiana of possession of the barges and towboats for the terms of the proposed lease. This offer was made in good faith and Standard Oil Company of Louisiana was at all times financially able to carry out the obligations which would have devolved upon it had a lease been made pursuant to its offer."

D. The requested special finding of fact embodied in the Commissioner's finding 62, which is as follows:

"In the year 1926 it would have been impossible for plaintiff to for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least two years after the date of the letting of the contracts therefor to have such barges and towboats built.

"In the year 1926 it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period

of at least twenty months after the date of the letting of the contracts therefor to have such barges and towboats built."

139 E. The requested special finding of fact embodied in the the Commissioner's finding 64, which is as follows:

"On March 25, 1923, the towboats and barges had a remaining normal and useful life of about thirty years."

F. The requested special finding of fact embodied in the Commissioner's finding 66, which is as follows:

"The land provided by plaintiff for the unloading facilities had a reasonable value of $20,000 throughout the period from 1921 to 1931."

G. The requested special finding of fact embodied in the Commissioner's finding 68, which is as follows:

"The erection of the unloading facilities on the runways under the provisions of the supplemental contract cost $210,000."

H. The requested special finding of fact embodied in the Commissioner's finding 71, which is as follows:

"During the period from March 25, 1923, to the present time, the reasonable rental value of the unloading facilities was $25,000 per year."

I. The requested special finding of fact embodied in the Commissioner's finding 72, which is as follows:

"From the time when plaintiff surrendered the unloading facilities to defendant in July 1926, pursuant to the court order, to the present time, plaintiff has provided one day and one night watchman for necessary services in watching the unloading facilities for the benefit of defendant and has obligated himself to pay or has paid $125 per month for each watchman, which was a reasonable expense therefor and for which plaintiff has never been paid."

140 J. The requested special finding of fact embodied in the Commissioner's finding 75, which is as follows:

"In the years 1923 through 1926, both inclusive, if any loan had been negotiated for a sum of money sufficient to reproduce the towboats and barges under a loan agreement permitting and requiring repayment in fifteen equal annual installments during a period of fifteen years commencing one year after the making of the loan, the borrower would have been required to pay interest on such loan for the duration thereof at the rate of 6.138 percent per year. In addition the borrower would have been required to pay a substantial commission or discount and to give as a bonus an interest in the operation of the towboats and barges."

II. This Court erred in failing to take into consideration in determining the amount of recovery an offer made by the Standard Oil Company of Louisiana to rent the Goltra fleet, the

substance of which offer is embodied in the requested special finding of fact which is the Commissioner's finding 61, set forth above.

III. This Court erred in finding and concluding that there was no market value for Edward F. Goltha's lease of said fleet and the option to purchase.

IV. This Court erred in failing to take into consideration, in arriving at the award made to the plaintiffs, an amount measured by the net reasonable market rental value of said fleet on the Mississippi River and its tributaries from March 1922 to the date of judgment.

141 V. This Court erred in failing to take into consideration, in arriving at the award made to the plaintiffs, an amount measured by the rental value of said fleet which amount said fleet could and would have earned but for the seizure of said fleet by defendant's officers for the use and benefit of defendant.

VI. This Court erred in failing to take into consideration in arriving at the award made to the plaintiffs, prospective profits which would have resulted from plaintiff's property rights in said fleet but for the seizure thereof by representatives of defendant for the use and benefit of defendant.

VII. This Court erred in limiting the amount of recovery by way of just compensation to the sum of $350,000 with interest at six percent per annum, not as interest, but as part of just compensation.

Wherefore, plaintiffs pray that said judgment, insofar as appealed from by plaintiffs, may be modified or reversed, and that an award may be made to the plaintiffs taking into consideration all of the factors and evidence properly relating thereto, and for such other and further relief as to the Court may seem just and proper.

Dated June 24, 1940.

DWIGHT, HARRIS, KOEGEL & CASKEY,
Dwight, Harris, Koegel & Caskey,
Attorneys for Plaintiffs.

HERMAN J. GALLOWAY,
Of Counsel.

145 XXI. *Order allowing cross-appeal to the Supreme Court of the United States*

Filed June 25, 1940

This cause having come before this Court on this 25th day of June 1940, upon the petition of the plaintiffs, praying for leave to cross-appeal to the Supreme Court of the United States for reversal or modification of a part of the judgment herein and

that a duly certified copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered this motion, together with petitioners' statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain a cross-appeal in this cause, the same having been duly filed with the Clerk of this Court, It is therefore, by the Court—

Ordered and adjudged that the plaintiffs be and they are hereby allowed a cross-appeal from that part of the order of judgment of this Court, to which this cross-appeal is addressed and that a duly certified copy of the record be transmitted to
146 the Clerk of the Supreme Court of the United States. It is further—

Ordered that the plaintiffs be and they are hereby permitted a period of 40 days from the date hereof within which to file and docket this cross-appeal to the Supreme Court of the United States.

This 25th day of June 1940.

RICHARD S. WHALEY,
Chief Justice of the Court of Claims of the United States.

148 [Citation in usual form showing service on Francis Biddle, filed June 25, 1940, omitted in printing.]

150 XXIV. *Plaintiff's request for portions of record*

Filed and allowed June 25, 1940

To WILLARD L. HART, Esq., *Clerk of the United States Court of Claims:*

In compliance with Rule 10 of the Supreme Court of the United States, the plaintiffs hereby indicate the portions of the record to be incorporated in the transcript of record on this cross-appeal:

I. The petition (Record, pp. 1 through 36, both inclusive).

II. The general traverse filed by defendant.

III. The Report of Commissioner (Record, pp. 47 through 81, both inclusive).

IV. The first paragraph of plaintiffs' request for special
151 findings of fact and exceptions to the Commissioner's report (Record, p. 82) and the signature thereto (Record, p. 98).

V. Defendant's exceptions to the Commissioner's Report (Record, pp. 99 to 139, both inclusive) and the signatures thereto (Record, p. 158).

VI. Caption of defendant's brief (Record, p. 349) and the defendant's request for findings of fact (last paragraph on Record, p. 355) and signatures thereto (Record, p. 396).

VII. Plaintiffs' Exhibits 20, 22, 56, 57, 83, 86 D, 86 C, 111, and 142.

VIII. (a) That part of the testimony E. F. Wieck, comprised of questions and answers numbered 1 through 101, both inclusive, on pages 263 through 296 of the transcript.

(b) That part of the testimony of C. I. Fiero, comprised of questions and answers numbered 1 through 101, both inclusive, on pages 307 through 324 of the transcript.

(c) That part of the testimony of Thomas L. Faudree, comprised of questions and answers 1 through 69, both inclusive, on pages 334 through 345 of the transcript, and the following questions and answers 97, 98, 99, 100, on pages 350 and 351 of the transcript, and questions and answers 106, 107, and 108 and the colloquy following the latter question on page 352 and 353 of the transcript.

152 (d) All of the testimony of John F. Cogswell included on page 378 through the phrase "Witness excused" on page 403 of the transcript.

(e) That part of the testimony of E. Field Goltra, Jr., comprised of questions and answers 1 through 7, both inclusive, on pages 411 and 412 of the transcript; all questions and answers 29 through 40, both inclusive, on pages 416, 417, and 418 of the transcript; questions and answers 51, 52, and 53 on page 422 of the transcript; questions and answers 29 through 43, both inclusive, on pages 2284 through 2287 of the transcript.

(f) That part of the testimony of Henry Cason comprised of questions and answers numbered 1 through 23, both inclusive, on pages 612 through 616 of the transcript.

(g) All of the testimony of Herman T. Pott included on page 676 through the phrase "Witness excused" on page 692 of the transcript.

(h) All of the testimony of Ira Nelson Davenport included on page 703 through the phrase "Witness excused" on page 708 of the transcript.

(i) All of the testimony of Charles T. Campbell included on pages 732 through 751 of the transcript, both inclusive.

(j) That part of the testimony of John L. Taylor comprised of questions and answers numbered 1 through 22, both inclusive, on pages 752 through 765 of the transcript.

(k) All of the testimony of T. P. Butler and George
153 J. Walker included on pages 778 through 799, both inclusive.

(l) The testimony of Edward F. Goltra comprised of questions and answers numbered 1 through 4, both inclusive, on pages 802 and 803 of the transcript; questions and answers numbered 439 through 492, both inclusive, on pages 915 through 924 of the transcript; questions and answers numbered 553, 554, and 555 on pages 937 and 938 of the transcript; questions and answers numbered 688 through 691, both inclusive, on page 981 of the transcript; question and answer numbered 697 on page 982 of the transcript; questions and answers numbered 37 through 42, both inclusive, on pages 2237 and 2238 of the transcript; questions and answers numbered 1 through 10, both inclusive, on pages 1160, 1161, and 1162 of the transcript; questions and answers numbered 706 through 710, both inclusive, on pages 985 and 986 of the transcript.

(m) All of the testimony of Philip Rohan on pages 1145 through 1159 of the transcript, both inclusive.

(n) All of the testimony of Michael Hendy on pages 1226 through 1159 of the transcript, both inclusive.

(o) The testimony of DeWitt C. Jones, comprised of questions and answers numbered 1 through 4, both inclusive, on pages 1259 and 1260 of the transcript; questions and answers numbered 141 through 147, both inclusive, and questions and answers numbered 141 through 146, both inclusive, on pages 1310 through 1314
154 of the transcript.

(p) That part of the record commencing with "Mr. Holtzoff: It is hereby stipulated and agreed that if Lieut. Col. John C. Gottwals" on page 2137 of the transcript, continuing through all of page 2138 and through page 2139 to "(Discussion off the record followed)."

(q) All of the testimony of A. A. Coyle on pages 2141 through 2166 of the transcript, both inclusive.

(r) That part of the testimony of Maximilian von Pagenhardt comprised of questions and answers numbered 1 through 3, both inclusive, on pages 1635 through 1641; questions and answers numbered 24 through 50, both inclusive, on pages 1627 through 1633, and questions and answers numbered 56 through 75, both inclusive, on pages 1635 through 1641; questions and answers numbered 322 through 368, both inclusive, and the colloquy down to question 369 on pages 1705 through 1721 of the transcript; questions 423 through 527, both inclusive, on pages 1734 through 1757 of the transcript.

(s) Pages 2293 and 2294, down through the words "Plaintiff rests," of the transcript.

IX. The "Agreed statement of facts," which is a stipulation of facts signed by the parties hereto.

X. The Special Findings of Fact and Opinion of the Court herein.

155 XI. The judgment herein.

DWIGHT, HARRIS, KOEGEL & CASKEY,
Attorneys for Plaintiffs.

156 [Clerk's certificate to foregoing transcript omitted in printing.]

158 In Court of Claims of the United States

Title omitted.

Stipulation as to record on cross-appeal and petition for certiorari by plaintiffs

I

It is hereby stipulated and agreed by and between the plaintiffs herein through Dwight, Harris, Koegel & Caskey, their Attorneys of Record, and the defendant herein by and through the Solicitor General of the United States, that the record to be transmitted to the Supreme Court upon plaintiffs' cross-appeal and upon any petition for writ of certiorari which plaintiffs may file in the Supreme Court and the record to be considered by the Supreme Court upon such cross-appeal and such petition for writ of certiorari or hearing thereon if such writ be granted shall consist of:

A. The record filed by defendant upon its appeal to the Supreme Court of the United States in this cause;

159 B. This stipulation and the matters and things set out herein; and

C. Such other portions of the transcript and record herein as are specified in this stipulation; in lieu and instead of the record specified in the praecipe heretofore filed herein by plaintiffs upon such cross-appeal and in lieu of any additional designation by defendant.

II

A. It is further hereby stipulated by and between the parties hereto that for the purposes of such record in the Supreme Court of the United States and for the purposes of this cross-appeal or plaintiffs' petition for certiorari the following facts, set out in this paragraph A, which plaintiffs requested the Court of Claims to include in the Special Findings of Fact may be taken and considered as true:

"1. The average cost of the towboats was $375,000 each. The average cost of the barges was $110,000 each.

The value of the towboats and the barges from the year 1922 and thereafter until the end of the year 1924 was approximately the same as the original cost thereof.

"2. In May 1925, C. J. Fiero, vice president and general manager of Standard Oil Company of Louisiana, and E. F. Wieck, superintendent of lighterage of that company, desired to acquire for that company the use of the barges and towboats for the transportation of crude oil from its pipe line terminal at Grand Lake, Arkansas, down the Mississippi River to its refinery at Baton Rouge, Louisiana, and for the transportation of refined oils
160 up the river from Baton Rogue on the return trips, and for this purpose made an offer in behalf of Standard Oil Company of Louisiana to lease from plaintiff the nineteen barges and four towboats upon the following terms: Standard Oil Company of Louisiana was to furnish all of the crew, food, fuel, and other supplies and to assume all risks and costs of insurance, maintenance, repairs, and all other costs of operation, and was to pay to plaintiff rental at the rate of 1/15 of one percent per day on the cost of said towboats, assumed to be $400,000 each, and 1/10 of one percent per day on the cost of said barges, assumed to be $110,000 each, for a period of five years with the option to Standard Oil Company of Louisiana to continue to lease upon such terms for an additional period of five years. Plaintiff was willing and desired to accept the offer, but on account of the then pending litigation over his right to continue in possession of the barges and towboats, he was unable to do so as he could not assure Standard Oil Company of Louisiana of possession of the barges and towboats for the terms of the proposed lease. This offer was made in good faith and Standard Oil Company of Louisiana was at all times financially able to carry out the obligations which would have developed upon it had a lease been made pursuant to its offer.

"3. In the years 1922 through 1924, it would have been impossible for plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least two years after the date of the letting of the contracts therefor to have such barges and towboats built.

"In the year 1926 it would have been impossible for the plaintiff to obtain a fleet of barges and towboats similar to those here involved in the open market and it would have required a period of at least twenty months after the date of the letting of the contracts therefor to have such barges and towboats built.

"4. The erection of the unloading facilities on the runways under the provisions of the supplemental contract cost $210,000.

"5. During the period from March 25, 1923, to the present time, the reasonable rental value of the unloading facilities was $25,000 per year.

161 "6. From the time when plaintiff surrendered the unloading facilities to defendant in July 1926, pursuant to the court order, to the present time, plaintiff has provided one day and one night watchman for necessary services in watching the unloading facilities for the benefit of defendant and has obligated himself to pay or has paid $125 per month for each watchman, which was a reasonable expense therefor and for which plaintiff has never been paid."

It is further stipulated and agreed that the testimony forming the basis of the facts stated in paragraph II, A 2, above, was given by E. F. Wieck, at the pertinent time the Marine superintendent of Standard Oil Company of Louisiana, by C. I. Fiero, at the pertinent time vice president of that Company, by Thomas L. Faudree, who at the time of the making of the offer referred to therein was an employee of Goltra but who at the time of his testimony was not connected with Goltra, and by Goltra, and that when plaintiffs introduced this testimony the defendant made no objection to its introduction in evidence. It is further stipulated and agreed that nothing in this stipulation shall deprive the defendant of whatever right, if any, which it may have now to argue the incompetency, immateriality and irrelevancy of the facts stated in paragraph II, A 2, above.

B. It is further stipulated and agreed by and between the parties that plaintiffs requested the Court of Claims to include in the Special Findings of Fact, that:

"The reasonable market rental value on the Mississippi River and its tributaries of the towboats from March 1922 to the present time was 1/15th of one percent per day of the cost of each towboat, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of the towboats to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $2,000 per year per towboat.

"The reasonable market rental value on the Mississippi River and its tributaries of the barges from March 1922 to the present time was 1/10th of one per cent per day of the cost of each barge, the lessee furnishing all of the crew, food, fuel, and other supplies, and assuming all risks and costs of insurance, maintenance, repairs necessary for operation and a return of said barges to the lessor at the end of the lease in the same condition in which received, and all other costs of operation, except the expense of annual heavy overhaul and repair amounting to an average of $500 per year per barge."

And that defendant in lieu of that finding had requested the following finding:

"The rental rate charged by the Chief of Engineers for leasing War Department towboats and barges to private parties was 1/15 of 1 percent per day of the original cost of each towboat or barge. This rate was applicable when the lessor bore the cost of all ordinary and extraordinary repairs and replacements, and when the rental period was of brief duration. When the lessee bore the cost of all replacements and of ordinary and extraordinary repairs, the rental rate was 1/45 of 1 percent per day of the cost of each towboat or barge. During the period from March 1922 to the present time the commercial rate of renting towboats and barges on the Mississippi River and its tributaries was considerably less than the rate charged by the Chief of Engineers."

The following is a summary of the evidence in the record with relation to this finding and defendants requested finding.

1. The testimony of Goltra, E. F. Wieck, Thomas L. Faudree, and C. I. Fiero on behalf of plaintiffs with relation to the offer of the Standard Oil Company of Louisiana embodied in paragraph II, A 2, above.

162 2. The letter of Colonel John C. Gotwals written on July 16, 1924 in answer to plaintiff's inquiry which letter is plaintiff's Exhibit 83 and the body of which is as follows:

"Referring to your request for rental charges for floating plant under current practice along the Mississippi, you are now advised. Rental per month (All insurance other risks assumed by lessee) Steel towboats—2 percent of cost per month. Steel barges—3 percent of cost per month.

"These rates are approximate and substantially correct for present practice."

As to this letter the following was stipulated as Lieutenant Colonel John C. Gotwals' testimony:

"That on July 16, 1924 he wrote a letter to plaintiff, Edward F. Goltra, which has been marked in evidence as Plaintiff's Exhibit No. 83 at page 922 of the record; that such letter was written in response to an oral request of Mr. Goltra asking for the rental rates of Government plant in vogue at that time on the Mississippi River; that such requests were very common as substantial quantities of Government plant were rented to both private parties and other Government agencies at that time; that the clause contained in the letter 'All insurance other risks assumed by the lessee' means that insurance and other risks in the way of libel or liability charges possible under admiralty laws or Federal or State Laws would be a charge against the

lessee; that the lessor would bear the expense of annual heavy overhaul and repair, of depreciation and of interest; and that the lessee would bear the expense of current maintenance and upkeep only, with a view to returning the plant in the condition in which it was received;

"That he would testify on cross-examination that he is unable to give any estimate of what might be charged if the lessor would assume current upkeep and maintenance and that these charges depend upon usage of the equipment, and as they are necessary to the continued use of the plant are always assumed by the lessee."

163 3. The testimony of A. A. Coyle on behalf of the plaintiffs that he had been continuously engaged in the shipbuilding business on inland waterways in the United States since 1881; that he was employed by the United States Government in 1911 as an inspector of materials and construction of barges; that he remained in this employment until 1913; that in 1913 he resigned from the Government service and worked in St. Louis; that in 1917 he returned to Government employment and continued in the Government's employ until 1926; that he was Chief Inspector of materials and construction and Advisor of Mr. Mitchell, who was in charge of the details of the construction of the towboats and barges involved in this litigation; that he is still a naval architect residing at Dubuque, Iowa; that he is familiar with the cost of repairing and keeping up boats and barges, and that during all the time when he was engaged in the shipbuilding business the repair and upkeep of boats and barges was part of his work and duties; that in his opinion the usual annual overhaul and repair, excluding matters of accident and wrecks, for the first 20 years of the life of the Goltra towboats would have amounted to approximately $2,000 a year for each towboat, and that the usual annual overhaul and repair, excluding matters of accident and wrecks, of each of the Goltra barges for the first 20 years of the life of each barge would have amounted to approximately $500 a year for each barge.

4. The testimony of E. F. Wieck, on behalf of the plaintiffs, that he was engaged in river business in the Mississippi Valley from 1907 to the date of his testimony in 1936; that
164 he was engaged for a part of the time in the contract towing business; that thereafter he was in charge of river transportation for Standard Oil Company of Louisiana; that his duties required him to supervise the chartering of boats and barges, as well as the construction and operation thereof; that he was acquainted with the Goltra fleet; that in his opinion the reasonable market rental value of the Goltra fleet in 1922 and

approximately down to the time of his testimony would have been the same as the offer for that fleet made on behalf of Standard Oil Company of Louisiana in 1925 which was on a bare-boat basis, lessee to assume all charges, including repairs and insurance at a rental of 1/10th of one percent per day of the cost of the barges and 1/15th of one percent per day of the cost of the towboats, based on an estimated cost of the towboats of $400,000 each and the barges of about $110,000 each.

5. The testimony of Thomas L. Faudree on behalf of plaintiffs, that he had 44 years of river experience in the Mississippi Valley as mate, pilot, captain, and superintendent of various transportation units; that he was acquainted with the Goltra fleet, and that in his opinion the bare-boat rental value of that fleet, lessee to assume all expenses of upkeep, repairs, risks, and insurance was 1/15th of one percent of the cost of the towboats and 1/10th of one percent of the cost of the barges.

6. The testimony of Herman T. Pott on behalf of plaintiffs, that he had been engaged in the construction, repair, and rental of floating equipment on the Mississippi River and
165 its tributaries for 16 years; that he was with the Dravo Contracting Company when it built some of the barges involved in the present litigation; that in his opinion the fair market rental value of the barges on the Mississippi River from 1927 to the date of his testimony in 1937 was approximately 3% of the cost per month.

7. The testimony of Charles T. Campbell, on behalf of plaintiffs, that at the time of his testimony in 1936 he had had 37 years of experience in river transportation in the Mississippi Valley and that such experience included the rental of barges and towboats; that he was acquainted with Goltra's barges and towboats, that in his opinion the fair market rental value of plaintiffs' barges in 1922 and 1923 would have been about $90.00 per day for each barge on a bare boat basis and that as the demand increased after 1923 such rental would increase until from 1926 down to the time of his testimony the fair market rental value would have been at least $100,00 per day per barge; that towboats of approximately the horsepower of the Goltra towboats had in his opinion during the entire time from 1923 to the date of his testimony a fair market rental value on a bare boat basis of approximately $7,500 per month per towboat.

8. The testimony of Faudree, Pott, Campbell, and Taylor, a shipbuilder from Pittsburgh, all on behalf of plaintiffs that during all the time from 1923 to the date of their testimony the demand for river equipment such as the Goltra boats and
166 barges exceeded the supply thereof and the testimony of Faudree, Fiero, and Wieck, all on behalf of plaintiffs,

that the above mentioned shortage of river equipment was particularly noticeable with reference to barges like the plaintiffs' which were capable of carrying oil.

9. The testimony of Maximilian Von Pagenhardt, on behalf of defendant, that he was a naval architect; that he was the designer of the Goltra barges and towboats; that the Government rental rate was 1/15th of one percent per day of the original cost of a towboat and 1/10th of one percent per day of the original cost of a barge for very short periods not exceeding a few months; that in his opinion the commercial rental rate and long term rental rate was under the Government rate which he had mentioned and less than 1/10th of one percent per day of the original cost.

10. The testimony of Edward Fanflik, on behalf of defendant, that he was an assistant in the cost accounting section of the Chief of Engineers office; that the rental value of steel towboats and barges fixed by the Chief of Engineer's Office was only for interdepartmental loans of equipment and that the rental rate for such loans in 1925 was 1/15th of one percent per day of the original cost of each barge and each towboat. That this figure assumed that the lessor would bear the expense of current maintenance, upkeep, and repair; that the rental value thus testified to was according to the witness's records made up as follows: 1/45th of one percent applicable to depreciation and 2/45ths of one percent applicable to maintenance and repairs; that he had never operated a barge or towboat and that his only information about rental of equipment was such information as
167 came to him as an accountant. That he did not know the rental rate for towboats and barges between private parties in St. Louis. During the examination of this witness a circular letter dated December 1, 1919 issued by the Chief of Engineers was introduced in evidence. This letter explained the Chief of Engineers' rental rate of 1/15th of one percent per day on barges and towboats and contained the following paragraphs:

"6. When plant is loaned to private parties the rates given in paragraph 3 will be increased 50 percent to provide for the complete protection of the public interest involved, including the assumption by the United States of all risks of injury to Government employees while the plant is engaged in such work.

"7. The cost of all operating expenses for labor and supplies during the period of the loan will be borne by the borrowing appropriation, or by the private party or other borrowing agency.

"8. The cost of all renewals, and of ordinary and extraordinary

repairs to the plant, as authorized by the Chief of Engineers, excepting those incidental to damages such as are ordinarily covered by fire and marine insurance, will be borne by the lending appropriation, i. e., the one to which the plant belongs, and expenditures for these purposes from the borrowing appropriations, or by the borrowing agency, will be duly deducted from the charges set forth above, in making payments for the loan of the plant. The excepted items will be charged to the borrowing appropriation or agency."

C. It is further stipulated and agreed by and between the parties that plaintiffs requested the Court of Claims to include in the Special Findings of Fact, that:

"On March 25, 1923, the towboats and barges had a remaining normal and useful life of about thirty years."

168 And that defendant requested a similar finding of fact in which the remaining normal useful life was stated to be twenty years. The following is a summary of the evidence in the record with relation to this finding and defendant's requested finding.

1. The testimony of Philip Rohan, on behalf of plaintiffs, that he had been in the boatbuilding and repairing business in the Mississippi Valley for the past 36 years; that for 18 years of this time he had headed his own company, which operated Marine ways on the Mississippi River in the vicinity of St. Louis; that he was acquainted with the equipment known as the Goltra fleet; that in his opinion the reasonable useful life of the towboats and barges in ordinary commercial use, given the usual and customary care and current repairs was about 50 years.

2. The testimony of Ira Nelson Davenport, on behalf of plaintiffs, that he had been in the boatbuilding business in the Mississippi Valley at Dubuque, Iowa, from 1914 to the date of his testimony in 1936; that he was acquainted with the Goltra fleet; that in his opinion the normal life of the Goltra barges with reasonable care, in ordinary commercial use, would be from 35 to 40 years.

5. The testimony of Maximilian von Pagenhardt, on behalf of defendants, that he was a naval architect; that he had designed the Goltra fleet; that in his opinion the ordinary useful life of barges and towboats on the Mississippi River was 20 years; that the steamer "Sprague," which had been rebuilt

169 several times and which was the only towboat operating on the Mississippi River comparable in size to plaintiff's towboats, had been operating for 40 years at the time of Von Peganhardt's testimony.

D. It is further stipulated and agreed by and between the parties that plaintiffs requested the Court of Claims to include in the Special Findings of Fact, that:

"The land provided by plaintiff for the unloading facilities had a reasonable value of $20,000 throughout the period from 1921 to 1931."

And that defendant requested a similar finding of fact in which the value of the land was stated to be $10,412.50. There was testimony in the record by two real estate appraisers called by plaintiff that the land had a value between $27,000 and $29,640 and there was testimony by a St. Louis real estate appraiser who was an employee of defendant's War Department that the land had a value of $10,412.50.

E. It is further stipulated and agreed by and between the parties hereto that plaintiffs requested the Court of Claims to include in its Special Findings of Fact, that:

"In the years 1923 through 1926, both inclusive, if any loan had been negotiated for a sum of money sufficient to reproduce the towboats and barges under a loan agreement permitting and requiring repayment in fifteen equal annual installments during a period of fifteen years commencing one year after the making of the loan, the borrower would have been required to pay interest on such loan for the duration thereof at the rate of 6.138 percent per year. In addition the borrower would have been required to pay a substantial commission or discount and to give as a bonus an interest in the operation of the towboats and barges."

170 And that defendant requested in place of this finding the following:

"During the period from 1923 to 1926, inclusive, the interest rate on loans was between 3.68 and 5.12 percent per year."

Plaintiffs' evidence with relation to the subject matter of this finding and defendant's requested finding is embodied in plaintiffs' Exhibit 142, which is the affidavit of John R. Dillon, offered in evidence pursuant to stipulation between the parties that such affidavit might be received with the same force and effect as if Mr. Dillon had personally appeared and testified in this case. Plaintiffs' Exhibit 142, hereto annexed, shall be included as a part of the record herein. Defendant's evidence with relation to the subject matter of this finding and defendant's requested finding is incorporated in defendant's Exhibit A–36. Defendant's Exhibit A–36, hereto annexed, shall be included as a part of the record herein.

III

It is further stipulated and agreed by and between the parties hereto that the record to be transmitted to the Supreme Court upon plaintiffs' cross-appeal and upon any petition for writ of certiorari which plaintiffs may file shall include in addition to this stipulation and the matters referred to above in this stipulation the following:

171 "JULY 18, 1923.

"MR. EDWARD F. GOLTRA,
"*St. Louis, Mo.*

"DEAR MR. GOLTRA: The Secretary of War directs me to inform you as follows:

"The insurance on the towboats and barges, which were held by you under the lease, and which are now operating under the jurisdiction of the United States Court, expired yesterday.

"Under the terms of your contract, it is necessary that you should keep insurance upon these boats, and he expects you to do so until such time as the case can finally be decided by the Supreme Court. A perfectly reasonable rental is being set aside and held, to be paid, if the Supreme Court decides that your lease is non-recoverable by the Secretary of War.

"Very truly yours.

(S) T. Q. ASHBURN
"*Colonel, C. A. C. (D. O. L.),*
"*Chief of the Inland and Coastwise Waterways Service.*"

IV

It is further stipulated and agreed by and between the parties hereto that nothing in this stipulation shall deprive the defendant of whatever rights, if any, it may have to move to dismiss the cross-appeal or to affirm the decision below or to object on the cross-appeal to the consideration of any facts other than those embodied in the special findings of fact.

FRANCIS BIDDLE,
Solicitor General.
DWIGHT, HARRIS, KOEGEL & CASKEY,
Attorneys for Plaintiffs.

172 *Plaintiff's Exhibit No. 142*

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss:*

John R. Dillon, being duly sworn, deposes and says:

I am and since 1929 have been a member of the firm of Hayden, Stone & Co., investment bankers, with offices at 25 Broad Street, New York, N. Y., and at 75 Federal Street, Boston, Mass.

My firm is, and it or its predecessors have been for more than thirty years, engaged in investment and private banking, financing various projects, buying, selling, and underwriting the issuance of securities including mortgage bonds, debentures, notes, and equipment trust certificates. I have been continuously engaged in this business since 1916.

I am connected with the following corporations, among others, in the capacities stated:

Lone Star Cement Corporation—Vice-President, Chairman of the Executive Committee and Director,

Twentieth Century-Fox Film Corporation—Director and Member of Executive Committee,

Raybestos-Manhattan, Inc.—Director and Member of Finance Committee,

Continental-Diamond Fibre Co.—Director,

American Agricultural Chemical Co.—Director,

Curtiss-Wright Corporation—Director and Member of Executive Committee,

Wright Aeronautical Corporation—Director and Member of Executive Committee.

I am acquainted with the financial market and the general financial situation as it existed in the United States in the years 1922 through 1926.

I have been requested to testify as to the probable rate of interest which a borrower, a resident of St. Louis, Missouri,
173 would have had to pay on a loan negotiated in the period 1923–1926, inclusive, to finance the construction of 19 barges and 4 towboats, substantially as described in Plaintiff's Exhibit 20 in the case of Goltra v. The United States, now pending in the Court of Claims of the United States. I have been asked to make the following assumptions:

a. *Amount.*—The amount of the loan would have been approximately $3,590,000.

b. *Owner's equity.*—The amount of the loan would have represented substantially the entire cost of construction and the borrower would have had little, if any, investment in the boats and barges.

c. *Term.*—The loan would have been repayable, with interest, in fifteen equal annual instalments, commencing one year after the making of the loan.

d. *Operation.*—The towboats and barges would have been operated on the Mississippi River and its tributaries.

e. *Security.*—The lender would have received a mortgage or other satisfactory lien on the boats and barges.

Upon the foregoing assumptions, no banking institution, public or private, commercial or investment, would, in my opinion, have made or underwritten such a loan. My reasons for this opinion, among others, are that the loan would have represented 100% of the cost of the chattels upon which the loan would have been made and that the repayment period was as long as fifteen years. In my judgment, the only possible sources of such financing would have been private parties who would have required an annual interest rate of not less than six percent, a substantial commission or discount, and a share in the enterprise operating the barges and towboats.

174 I have made an investigation of the principal financing of maritime and shipping issues offered by banking institutions in 1925, 1926, and 1927. Exhibit A hereto annexed is a table of all such financing as disclosed by the standard authority, National Statistical Service in its "American Underwriters and Their Issues." In some instances the issuing dates on this table have been taken from other financial services such as Poor's or Moody's Manual and these sources are indicated. The average coupon interest rate of all such financing was 6.138 percent. The offering price to the investing public, on the whole, was not more than the par value of the securities. The interest cost to the borrower, however, would have been in excess of the coupon rate because of usual underwriting and distributing commissions charged by bankers, which, in my opinion, would have brought the interest cost to an average figure of at least 6½%. While no compilation of maritime issues as such is known to me to be available for 1923 and 1924, it is my opinion from a knowledge of financial conditions and interest rates generally that the interest cost to a borrower would have been approximately the same in 1923 and 1924 as in the period from 1925 through 1926.

If the borrower who wished to acquire the boats and barges could have complied with the accepted standards for borrowing, i. e., a loan of no more than two-thirds of the value of the security, for a term of not more than five years, he could not, in my opinion, have borrowed the requisite sum for an annual interest rate of less than six percent, and if he had sold his obligations or procured underwriting therefor, he would have been

175 required, in my opinion, to pay a discount of at least five

percent. If the loan could have been placed by the borrower directly with a bank, it is my opinion that no additional discount would have been payable to the bank.

I have been asked also to give my opinion as to interest rates which the borrower, a resident of St. Louis, Missouri, above referred to, would have had to pay in the event that the loan originally negotiated in the period from 1923 through 1926 were at any time or at several times refinanced after the repayment of some instalments of principal on the original loan. I annex hereto, as Exhibit B, a table of maritime and shipping issues offered by banking institutions for some years subsequent to the year 1927. Exhibit B is taken from the same source as Exhibit A, and extends that exhibit through the year 1931. After that year no maritime or shipping issues are recorded in the source referred to until March 1936, when one small issue was underwritten. For the reasons heretofore stated, the interest cost to the borrowers listed in Exhibit B would, in my opinion, have been substantially in excess of the coupon rate or the interest rate at the offered price, because a commission would have been charged by underwriting and distributing bankers. Furthermore, in my opinion, during the depression years the value of the boats and barges above referred to would have decreased for security purposes, and it is my opinion that refinancing could not have been obtained upon terms substantially different from those which I have already stated as terms of obtaining an original loan.

I have been asked also to assume that the borrower, a resident of St. Louis, Missouri, could obtain financing or refinancing
176 from banks with which he had connections, presumably in the city of St. Louis, Missouri, or any other important cities on the Mississippi River. The assumption which I have been asked to make on this score requires me to assume that the borrower had sufficient collateral, aside from the boats and barges, to obtain short-term loans, not exceeding a year at a time, from his own bankers. Upon this assumption the borrower in St. Louis could, by reason of his own credit or assets, and irrespective of the boats and barges, have borrowed money for the purpose of financing the construction of the boats and barges at interest rates generally prevailing, at the time when the financing or refinancing was to be accomplished, in St. Louis or other Mississippi Valley cities in which he may have had banking connections. With respect to such interest rates, Standard Statistics Company, in its publication, "Standard Trade and Securities—Basic Statistics—Banking and Financing," has published data compiled by the Federal Reserve Board for the years from 1919 through 1937. This data is based upon certain geographic divisions of the country. I annex hereto, as Exhibit C,

the above-described compilation of interest rates in "27 Southern and Western Cities." I am informed and believe that included in this geographic designation are the city of St. Louis, Missouri, and other important cities on the Mississippi River from Minneapolis to New Orleans. With respect to the average interest rates shown on Exhibit C, it should be noticed that they are based upon (1) commercial loans—in other words, loans of sixty to ninety days on commercial paper, (2) demand loans which, in case of banks, are short-term loans and (3) time loans on securities. Such time loans are generally made for a period
177 of six months to one year. The interest rates on commercial loans particularly, and demand loans to some extent, are less than the interest rates on time loans. The borrower interested in financing his fleet could not do so by means of a commercial loan or a demand loan. The interest payable by the borrower on a time loan would be somewhat in excess of the average interest rate stated in Exhibit C.

While, as I have stated, I do not believe that a loan on the boats and barges referred to could be made from a banking institution, nevertheless, I have been asked to assume that by reason of repayments of a substantial part of the original loan, the borrower had achieved a sufficient equity in the boats and barges so that a bank would loan some substantial sum on the basis of a lien on said boats and barges. Such loan, in my opinion, could not be obtained at the average interest rates stated in Exhibit C. The borrower would have been required to pay interest in excess of the average rates, even on a loan made for one year because the boats and barges would not constitute the type of readily saleable collateral required for bank loans and the loan would be a time loan, which, as I have stated, would have carried a higher interest rate than the commercial or demand loans which make up a part of the average interest rate stated in Exhibit C.

In my opinion, the facts which I have been asked to assume make the hypothetical loan and any refinancing thereof wholly incomparable, as respects interest rates, with municipal, state, and United States issues, high-grade corporate bonds, as well
178 as commercial and other usual bank loans, in that the interest rate on the hypothetical loan and any refinancing thereof would have been materially higher than on such securities or bank loans.

(Signed) JOHN R. DILLON.

Sworn to before me this 21st day of May 1938.

CHARLES FINKLER,
Notary Public, New York County, No. 8.

Commission expires March 30, 1939.

179 *Exhibit A—Shipping and ferries*

Date of issue	Amount issued	Obligor and coupon rate	Issuing price or yield at issuing price	House and location
Jan. 1925	$5,000,000	Munson S. S. Line 3 yr. Sec. 6s Jan. 1, 1928.	99	Harris Forbes & Co., New York; Kidder Peabody & Co., Boston.
Jan. 1925	5,000,000	Pacific Steamship Co. 1st pref. Marine Eq. 6½s 1926-45.	5-6¼	Pierce Fair & Co., San Francisco (also other houses in New York, San Francisco, Seattle, and Los Angeles.
Mar. 1925	5,000,000	Cuyamel Fruit Co. 1st 6s 1940.	99	Lehman Bros., New York (also other houses in Chicago, New York & New Orleans).
Mar. 1926 [1]	500,000	Upper Mississippi Barge Line Co. 1st 5½s 1930.	100	Lane, Piper & Jaffray Inc., Minneapolis.
Apr. 1926 [1]	3,000,000	Hudson River Navigation Corp. 1st Conv. 6½s 1951.	6.70%	F. J. Lisman & Co., New York.
Apr. 1926	1,500,000	Electric Ferries, Inc., 1st 7s 1941.	[4] 100	G. E. Barrett & Co. Inc.; Frederick Pierce & Co., Philadelphia.
Jul. 1926	1,500,000	Golden Gate Ferries, Inc., Coll. Tr. 7s A 1941.	100	E. H. Rollins & Sons. San Francisco; First Securities Co., Los Angeles.
Sep. 1926 [2]	[2] 18,000,000	Canada S. S. Lines Ltd. 1st & Gen. 6s A 1941.	97	Kissel, Kinnicutt & Co., New York (also other houses Pittsburgh, Montreal, and New York).
Nov. 1926 [2]	1,100,000	Inland Steamship Co. 1st 5½s 1928-37.	5-5½%	First Trust & Savings Bank, Chicago.
Nov. 1926	1,100,000	Golden Gate Ferries, Inc., Coll. Tr. 6½s B 1941.	99	E. H. Rollins & Sons, San Francisco; First Securities Co., Los Angeles.
Mar. 1927	210,000	Gravel Motorship Corp. (Steel Diesel Motorship Ormidale) 1st 6s 1927-35.	100	Benjamin Dansard & Co., Detroit.
Mar. 1927	1,500,000	Hudson River Day Line 1st 6s 1939.	97	Eastman Dillon & Co., New York.
Mar. 1927	1,000,000	Golden Gate Ferries, Inc., Coll. Tr. 6½s B 1941.	99	E. H. Rollins & Sons, San Francisco (also other houses Los Angeles and San Francisco).
Apr. 1927 [3]	650,000	California Transportation Co., 1st 6s 1939.	100	Anglo London Paris Co., San Francisco (also other houses San Francisco).
Aug. 1927	925,000	Baltimore Steam Packet Co. secd 5s 1930-33.	5¼-5.40%	Continental Co., Baltimore (and another).
Aug. 1927	1,000,000	Cleveland & Buffalo Transit Co. 1st Marine Eq. & Terminal 5½s A 1929-43.	5.15-5¼%	Union Trust Co., Cleveland (Marine Trust Co., Buffalo).
Sep. 1927	125,000	Mobile & Gulf Navigation Co. 1st 7s 1928-37	6-7%	Ward Stearne & Co., Birmingham.
Dec. 1927	6,000,000	Munson Steamship Line 1 yr secd. 6s Jan. 1929.	100	Harris, Forbes & Co., New York; Kidder Peabody & Co., Boston.

[1] Offering date from Poor's Cumulative Vol. 2, 1926.
[2] Offering date from Moody's Industrial Manual, 1928.
[3] Offering date from Poor's Cumulative Vol. 2, 1927.
[4] Bonus of 4 voting trust certificates representing 4 shares of common stock given with each $1,000 bond (Poor's Cumulative Vol. 2, 1926; Moody's Utilities, 1927).

180 *Exhibit B—Shipping and ferries*

Date of issue	Amount issued	Obligor and coupon rate	Issuing price or yield at issuing price	House and location
Dec. 1928	$750,000	Puget Sound Navigation Co. 1st 6s. Nov. 1, 1929-38.	100-96½	Drumheller, Ehrlichman & White, Seattle and others (on west coast).
Jan. 1929	4,500,000	Munson Steamship Line Sec. 6s. Jan. 1, 1937.	98	Harris, Forbes & Co., and others.
Jan. 1929	2,500,000	Munson Steamship Line Deb. 6½s. Jan. 1, 1937 (with stock purch. warrants).	98	Brown Bros. & Co., and another.
Apr. 1929	175,000	Leatham Smith-Putnam Navigation Co. 1st 6½s, June 1, 1938.	100	Forgan Gray & Co., Inc., Chicago, and another.
Apr. 1929	1,750,000	Pacific-Atlantic S. S. Co. 1st & Gen. Marine Eq. 6½s A. Nov. 1, 1931-37.	6.80%	Freeman & Co., and another.
May 1929	5,000,000	Southern Pacific Golden Gate Ferries Ltd. 1st 5½s, Apr. 1, 1949.	99	E. H. Rollins & Son and others.
Oct. 1929	5,000,000	Hansa Steamship Lines (Germany) 6s, Oct. 1 1939 (with stock warrants).	93	Guaranty Co. of New York.
Feb. 1930	9,400,000	Canadian Natl. (West Indies) S. S. Ltd. 5s March 1, 1955.	100	Dillon, Read & Co., and others.
Mar. 1930	600,000	Southern States Transportation Co. Conv. Deb. 7s, Dec. 1, 1939.	100	Stranahan, Harris & Oatis, Inc., and another.
May 1930	650,000	Sabine Towing Co., Inc. 6s, Sept. 1, 1930-June 1, 1934.	4.00-6.00%	Central Ill. Co.
Mar. 1931	1,650,000	Sensibar Transportation Co. 1st Mtge. Marine Eq. 6s, Mar. 15, 1943 (transportation of sand and gravel).	99	Union Cleveland Corp., and others.

181 *Exhibit C—Financing—Prevailing rates charged customers by banks in principal cities*

Page A-29

Weighted Averages. Unit: Per Cent

27 Southern and Western Cities

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Avg.
1937	4.16	4.15	4.15	4.21	4.17	4.18	4.19	4.18	4.18	4.16	4.17	4.15	4.17
1936	4.47	4.51	4.44	4.40	4.43	4.39	4.35	4.25	4.29	4.22	4.23	4.14	4.34
1935	4.96	4.84	4.85	4.80	4.79	4.76	4.58	4.63	4.51	4.58	4.51	4.55	4.69
1934	5.40	5.39	5.40	5.34	5.28	5.19	5.07	5.05	5.04	5.05	4.93	4.92	5.17
1933	5.60	5.56	5.66	5.68	5.66	5.62	5.54	5.53	5.55	5.50	5.42	5.43	5.56
1932	5.61	5.61	4.64	5.63	5.64	5.62	5.63	5.68	5.63	5.56	5.55	5.60	5.62
1931	5.50	5.43	5.40	5.36	5.26	5.34	5.30	5.20	5.32	5.38	5.53	5.56	5.39
1930	6.12	6.05	5.98	5.86	5.75	5.69	5.63	5.58	5.55	5.54	5.50	5.43	5.72
1929	5.94	5.96	6.04	6.07	6.10	6.16	6.17	6.22	6.27	6.29	6.29	6.20	6.14
1928	5.53	5.53	5.54	5.54	5.56	5.67	5.77	5.80	5.82	5.87	5.90	5.91	5.70
1927	5.72	5.71	5.65	5.57	5.59	5.54	5.52	5.53	5.61	5.56	5.56	5.60	5.60
1926	5.56	5.65	5.62	5.65	5.61	5.55	5.54	5.56	5.60	5.66	5.67	5.68	5.64
1925	5.57	5.55	5.61	5.61	5.58	5.59	5.59	5.60	5.58	5.53	5.55	5.61	5.58
1924	6.02	5.91	5.89	5.89	5.79	5.69	5.63	5.57	5.55	5.47	5.53	5.53	5.71
1923	5.90	5.91	5.81	5.94	5.92	5.91	5.96	5.98	5.94	5.95	5.99	5.99	5.94
1922	6.86	6.46	6.35	6.22	6.23	6.13	6.04	6.02	5.94	5.89	5.94	5.90	6.14
1921	7.10	7.11	7.13	7.09	7.06	7.05	7.04	7.03	6.96	6.85	6.74	6.67	6.99
1920	6.16	6.26	6.43	6.47	6.56	6.88	7.00	6.99	7.07	7.04	7.08	7.07	6.75
1919	6.11	6.03	6.02	6.01	6.00	5.91	5.98	5.94	5.98	5.96	5.96	6.10	6.00

NOTE.—Figures relate to rates charged by reporting banks to their own customers as distinguished from open-market rates. All averages are based on rates reported for three types of customer loans—commercial loans, and demand and time loans on securities. The method of computing the averages takes into account (a) the relative importance of each of these three types of loans and (b) the relative importance of each reporting bank, as measured by total loans. In the two group averages the average rate for each city included is weighted according to the importance of that city in the group, as measured by the loans of all banks.

Source of data—Federal Reserve Board.

182 *Defendants' Exhibit A-36*

The prevailing interest rates during the period in question, as compiled by the Federal Reserve Board, are as follows:

Year	Prevailing rate on prime commercial paper, 4-6 months (Federal Reserve Board)	Average yield on high-grade corporate bonds (Moody's Investors service)	United States Government Bonds [1]	Municipal Bonds (high grade) [2]
1919	5.56	5.48	4.62	4.45
1920	7.54	6.12	5.32	4.98
1921	6.56	5.98	5.09	5.09
1922	4.48	5.12	4.30	4.23
1923	5.01	5.12	4.36	4.25
1924	3.88	5.00	4.06	4.20
1925	4.03	4.88	3.86	4.09
1926	4.34	4.73	3.68	4.08
1927	4.11	4.57	3.34	3.98
1928	4.86	4.55	3.33	4.05
1929	5.85	4.73	3.60	4.27
1930	3.59	4.55	3.28	4.07
1931	2.63	4.65	3.31	4.02
1932	2.73	5.01	3.68	4.65
1933	1.72	4.49	3.31	4.71
1934	1.03	4.00	3.10	3.95
1935	.76	3.60	2.70	3.16
1936	.75	3.25	2.47	2.68

[1] Yields on bonds due or callable after 8 years, compiled by United States Treasury Department.
[2] Compiled by Standard Statistics Co.

183 In the Court of Claims of the United States

No. 42696

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED

vs.

THE UNITED STATES

Clerk's certificate

I, Willard L. Hart, Chief Clerk, Court of Claims of the United States, certify that the annexed stipulation as to record on cross-appeal and petition for certiorari by plaintiff (paged from 1 to 26, inclusive) in the above-entitled case is a true copy of the original on file in this office by leave of court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 29th day of June A. D., 1940.

[SEAL] WILLARD L. HART,
Chief Clerk Court of Claims of the United States.

184 In Supreme Court of the United States

No. 191

Statement of points relied upon and designation of record for printing

Filed July 3, 1940

Pursuant to Rule 13, paragraph 9 of this Court, the appellant states that it intends to rely upon all of the points in its Assignment of Errors.

The appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

FRANCIS BIDDLE,
Solicitor General.

Service acknowledged 2nd day of July, 1940.

HERMAN J. GALLOWAY,
Counsel for appellee.

July 1940.

[File endorsement omitted.]

185 In Supreme Court of the United States

No. 192

Statement of points and designation of record pursuant to rule 13

Filed June 29, 1940

Come now Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, deceased, cross-applicants herein and file the following statement of points upon which they intend to rely and the following designation of parts of the record deemed necessary for the consideration thereof.

186 I

POINTS

A. The Court of Claims erred as a matter of law in failing to make findings covering the subject matter of each of the requested special findings of fact set out in subdivisions A through J, both inclusive, of Item I of the Assignment of Errors herein.

B. An offer made by Standard Oil Company of Louisiana to rent the Goltra fleet should have been considered by the Court of Claims in determining the amount of recovery.

C. The net reasonable market rental value of the Goltra fleet should have been considered by the Court of Claims in determining the amount of recovery.

D. The amount which the Goltra fleet could and would have earned, but for the taking thereof by the United States, as measured by the rental value of the fleet should have been considered by the Court of Claims in determining the amount of recovery.

E. The market value of the original and supplemental contracts between Goltra and the United States should have been considered by the Court of Claims in determining the amount of recovery.

F. In the event that this Court shall conclude upon the appeal of the United States herein that in determining the amount
187 of recovery the Court of Claims should not have adhered to the usual measure of just compensation, but should have measured the recovery on the basis of legal damages, then the Court of Claims should have considered loss of prospective profits to Goltra by reason of the taking of the fleet and should have considered the reasonable rental value of the fleet, its earn-

ing capacity as measured by rental value, as well as the offer to rent the fleet made by Standard Oil Company of Louisiana.

G. The amount of recovery allowed by the Court of Claims is inadequate as a matter of law.

II

DESIGNATION OF RECORD

All parts of the record heretofore filed on this cross-appeal are deemed necessary for a consideration of the foregoing points of law and it is respectfully requested that such record be printed by the Clerk of this Court.

Respectfully submitted.

HERMAN J. GALLOWAY,
FREDERICK W. P. LORENGEN,
Attorneys for Cross-Appellants.

To the SOLICITOR GENERAL OF THE UNITED STATES, *Counsel for Cross-Appellee:*

You are hereby notified that a Statement of Points and Designation of Record Pursuant to Rule 13 in the above entitled cause was filed in the Supreme Court of the United States on the 29th day of June 1940, a copy thereof is served upon you herewith.

HERMAN J. GALLOWAY,
Counsel for Cross-Appellants,
728 17th Street NW., Washington, D. C.

Service accepted this 1st day of July 1940.

FRANCIS BIDDLE,
Solicitor General, Counsel for Respondent,
Department of Justice, Washington, D. C.
per W. M. S.

[File endorsement omitted.]

[Endorsement on cover:] Enter Attorney General in 191. File No. 44540, 44541. Court of Claims. Term No. 191 and 192. No. 191. The United States, Appellant vs. Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased. No. 192. Kate B. Goltra and E. Field Goltra, Jr., Executors of the Estate of Edward F. Goltra, Deceased, Appellants vs. The United States. Appeals from the Court of Claims. Filed June 29, 1940. Term No. 191 O. T. 1940, 192 O. T. 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940